

A TREATISE
ON THE
LAW OF
PUBLIC UTILITIES

INCLUDING

MOTOR VEHICLE TRANSPORTATION
AIRPORTS AND RADIO SERVICE

BY

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§ 705. Motor vehicles as public utilities.—Motor vehicles, operating upon our streets and highways for hire as common carriers, are subject to the same regulation and control as other public utilities. In providing transportation for all persons and

property for hire with the general undertaking to serve the public indiscriminately, motor vehicles are properly classed as common carriers and subject to be regulated as such.

The practical necessity and obvious justice of subjecting motor vehicles, which are operating as common carriers and using the streets and highways exclusively as the means of their transportation, to public regulation and control the same as other common carriers, and to the payment of a reasonable charge for the privilege of such use of the highways in the prosecution of their business, are well expressed as follows in the case of *Portland Van & Storage Co. v. Hoss* (Ore.), 9 Pac. (2d) 122: "It will be observed from the description of the plaintiffs' business, as set forth in their complaint, that they operate freight-carrying trucks over the streets of our cities and the highways of this state, and make charges for the services rendered. Evidently a very substantial part of the transportation plant of each of the plaintiffs consists of these roadways which constitute the road-bed of their transportation facilities. Without streets and highways the business of these plaintiffs and the income which they receive would be impossible. These costly improvements have not been constructed out of the taxes paid by the plaintiffs alone, but from the contributions made by the entire public. Yet the operation of heavy trucks subjects the roadway to severe wear, and unless constant repairs are made, the streets and highways will become impassable. Likewise, the operation of powerful trucks with their broad, projecting bodies, laden with heavy loads of freight, readily becomes a menace to the safety of others who are traveling upon the same pavement unless the operation of the trucks is supervised by public officers. Thus appears another item of expense which must somehow be discharged. The above circumstances readily suggest that the business of transporting freight for compensation upon the state's highways may properly be made the subject of an occupation tax. * * * It is our opinion that the legislature's act, which placed the plaintiffs in a separate classification because they make a charge for their services in hauling freight upon the public roadways, shows no abuse of discretion, but is a reasonable classification."

§ 706. **Regulation and control.**—The rapidly increasing use of motor vehicles for hire, whether as private or common carriers, makes the subject of their proper regulation and control the most important of all our modern transportation problems. The final determination of their own relations among themselves and with other common carriers is one of the most difficult, far-reaching and fundamental of all our transportation problems,

requiring early solution. The proper sphere of each form of transportation and its relation to all others, invites the questions of whether they are to be coordinated or be competitive, whether one form should exclude all others, and if not, how the new form by motor vehicles shall be coordinated with the present systems of local transportation and with each other, if operating on the competitive plan, and demand the best thought and most serious consideration of all who have made the subject a special study, together with those who are actively engaged in this field of operation and investment.

In regulating the use of its highways the state may require motor vehicles to secure licenses, pay taxes, and provide liability insurance as a condition of using its highways, not only as a payment for the privilege, the proceeds of which may be used for the construction and maintenance of such highways, but as a regulation for the promotion of the public safety. In making such regulations the state may exempt motor vehicles operating within municipalities and within a reasonable radius of their borders and thus leave this matter for local regulation and control by the municipalities. The state may also exempt motor vehicles which carry the livestock and farm products of its owners to market and supplies secured there for the use of such owners, because this use of the highways would be infrequent and personal. The state may also exempt from the operation of such regulation motor vehicles used for the transportation of school children, because of the nature of the service and the public interest involved in it, as was indicated in the case of *Continental Baking Co. v. Woodring*, — U. S. —, 76 L. ed. 1155, 52 Sup. Ct. 595, where the court said: "Plaintiffs are 'private motor carriers of property,' operating bakeries in Kansas and other states and making deliveries to their customers by their own trucks. They contend that the statute by reason of the obligations it imposes, and of its classifications, violates the due process and equal protection clauses of the Fourteenth Amendment, the provision as to the privileges and immunities of citizens (article 4, section 2), and the commerce clause (article 1, section 8, paragraph 3), of the federal Constitution. The statute relates to motor vehicles, comprehensively defined, when used upon any public highway of the state for the purpose of transporting persons or property. It applies to those who are engaged in such transportation as 'public motor carriers' of property and passengers, 'contract motor carriers' of property and passengers, and 'private motor carriers of property.' * * *

Public motor carriers, contract motor carriers, and private motor

carriers of property are forbidden to operate motor vehicles for compensation on any public highway except in accordance with the provisions of the act, section 4. The public service commission is vested with supervision of these carriers in all matters affecting their relationship 'with the traveling and shipping public' and, specifically, to prescribe regulations in certain particulars hereinafter mentioned. * * * Section 7. Contract motor carriers and private motor carriers of property 'either in intrastate commerce or in interstate commerce' must obtain licenses. * * * No certificate or license is to be issued by the commission to any of the described motor carriers until a liability insurance policy approved by the commission has been filed 'in such reasonable sum as the commission may deem necessary to adequately protect the interests of the public with due regard to the number of persons and amount of property involved, which liability insurance shall bind the obligors thereunder to pay compensation for injuries to persons and loss of or damage to property resulting from the negligent operation of such carrier.' No other or additional bonds or licenses than those prescribed in the act are to be required by any city or town or other agency of the state. * * * 'Private motor carriers of property' must obtain a license, pay a tax and file a liability insurance policy. The public service commission has no authority to refuse a license if the described information is given with the application, the liability insurance policy is filed, and there is compliance with the regulations and payment of the license fee. * * * The tax and the license fees, over the expenses of administration, go to the highway fund of the state for the maintenance and reconstruction of the highways the carrier is licensed to use. The insurance policy is to protect the interests of the public by securing compensation for injuries to persons and property from negligent operations of the carriers. * * * Requirements of this sort are clearly within the authority of the state which may demand compensation for the special facilities it has provided and regulate the use of its highways to promote the public safety. Reasonable regulations to that end are valid as to intrastate traffic and, where there is no discrimination against the interstate commerce which may be affected do not impose an unconstitutional burden upon that commerce. * * * The challenged exemptions are set forth in section 2. The first, which excludes from the application of the act motor carriers who operate wholly within a city or village of the state, has an obviously reasonable basis, as such operations are subject to local regulations. In protecting its highway system the state was at liberty to leave its local communities unembarrassed, and

was not bound either to override their regulations or to impose burdensome additions. * * * We think that the legislature could properly take these distinctions into account and that there was a reasonable basis for differentiation with respect to that class of operations. In this view, the question is simply whether the fixing of the radius at twenty-five miles is so entirely arbitrary as to be unconstitutional. It is obvious that the legislature in setting up such a zone would have to draw the line somewhere, and unquestionably it had a broad discretion as to where the line should be drawn. In exercising that discretion, the legislature was not bound to resort to close distinctions or to attempt to define the particular differentiations as to traffic conditions in territory bordering on its various municipalities. *Ohio Oil Co. v. Conway*, 281 U. S. 146, 159, 74 L. ed. 775, 781, 50 Sup. Ct. 310. * * * The exemption runs only to one who is carrying his own livestock and farm products to market or supplies for his own use in his own motor vehicle. * * * The legislature in making its classification was entitled to consider frequency and character of use and to adapt its regulations to the classes of operations, which by reason of their habitual and constant use of the highways brought about the conditions making regulation imperative and created the necessity for the imposition of a tax for maintenance and reconstruction. As the court said in *Alward v. Johnson*, 282 U. S. 509, 513, 514, 75 L. ed. 496, 499, 75 A. L. R. 9, 51 Sup. Ct. 273: 'The distinction between property employed in conducting a business which requires constant and unusual use of the highways, and property not so employed, is plain enough.' * * * The fourth exemption is 'of transportation of children to and from school.' The distinct public interest in this sort of transportation affords sufficient reason for the classification."

§ 707. **Federal regulation and interstate commerce.**—Regulation may be by the federal, state or municipal government, depending on the nature and scope of the service and the constitutional or statutory provisions, covering the subject in each particular case. While federal regulation of interstate transportation by motor vehicles has not yet been attempted, the unusual growth and development of this means of transportation and the rapid expansion of this form of common carriage today makes it only a question of a short time until this field of public service will be regulated by the federal government as an important and ever increasing branch of interstate commerce.

§ 708. **Power of state regulation and control.**—In the absence of federal regulation and control the states have the

undoubted right to regulate motor vehicles operating for hire as common carriers. The enormous increase in the number and size of motor vehicles, there being now about one for each group of six persons, and the vast extent to which they have been developed as common carriers has resulted in serious interference with other carriers and far exceeded their regulation and control by the state or by state agencies—the municipalities or public utilities commissions. In the absence of constitutional provisions or statutory regulations, delegating such control to municipal corporations, the state has the complete control of the subject; at least until congress acts in the matter of the regulation of interstate commerce.

In regulating the use of its highways, the state generally may provide the length and size of motor vehicles operating thereon, as is indicated in the case of *Reaves v. State* (Tex. Cr.), 50 S. W. (2d) 286, where the court said: "Trucks, or trucks with a trailer attached, of more than forty-five feet length, are forbidden the use of the highways of this state by statutes presumably enacted for the preservation of the roads and their rightful users."

The state, through its public utilities commission, may, in the interest of the public safety and for the protection of its highways, regulate motor vehicles operating as common carriers over its highways by limiting their size and equipment, and, in the exercise of such power of regulation, the commission is given a wide discretion which is not subject to review by the courts unless the action is unreasonable or arbitrary, for as the court said in the case of *Coeur d'Alene Auto Freight v. Public Utilities Comm.* (Idaho), 1 Pac. (2d) 627, P. U. R. 1932B, 291: "There was much testimony disclosing there is danger attending the operation of this large equipment, in consideration of the condition of the road, which would be avoided by the operation of smaller buses and trucks. This testimony was neither arbitrary nor unreasonable, and we think such testimony afforded a reasonable foundation for the finding to that effect by the commission. In this behalf it should be noted the commission found that accidents in connection with these operations had been rare notwithstanding the equipment complained of and the condition of the road, but from the commission's conclusions this fact seems to be attributed to the unusual skill and carefulness of the company drivers. Nor do we think it can be said the commission acted arbitrarily because the change required is inconvenient and expensive. However, the commission's judgment or discretion in such matters, if sustained by reasonable showing, is not subject to review by this court because, on appeal from a

decision of the public utilities commission, the jurisdiction of the Supreme Court is limited to determining whether the commission has pursued its statutory authority and whether the order complained of infringes the constitutional rights of the appellants. * * * An examination of the authorities upon this and related constitutional questions discloses that regulating a common carrier business upon the highways is considered quite different from ordinary policing. It is derived from a different source. The policing power deals with rights of the public in the road and is restricted to regulatory supervision differing from a commission's supervision of a common carrier business which the state permits upon the road. In the supervision of such business it is held the power is plenary and may extend even to exclusion because the regulation of the business is the regulation of a privilege permitted and controlled by the state. And it is quite generally held that the business of a common carrier of freight or passengers permitted upon the highways is regulatory independently of any police power supervising the ordinary and usual rights of citizens in the highway, and independent of the ordinary laws establishing rules of the road governing ordinary rights in and upon the highway. The commission, in prescribing 'rules and regulations for auto transportation companies as may be necessary to provide for adequate service and safety of operation,' in a case where safety of operation seems to require it, may undoubtedly adopt a standard as to size of equipment. *Reo Bus Lines Co. v. Southern Bus Line Co.* (1925), 209 Ky. 40, 272 S. W. 18."

Under its power of regulation and control of the use of its highways by motor vehicles, the state may limit the size of such vehicles and their loads as well as their speed, but where the regulation provides that motor vehicles may not carry a load of more than 500 pounds which contains more than thirty cubic feet, the regulation will not be sustained because it is unreasonable as such a weight load is no more injurious to highways or dangerous than a load of less weight or size, especially where it appears that the regulation will unreasonably and unnecessarily interfere with the transportation of uncompressed cotton and other like commodities. The state may also provide for a larger load or equipment which can not be dismantled because of the necessity of transporting such property in its existing condition, as is indicated in the case of *Sproles v. Binford*, 52 Fed. (2d) 730, where the court spoke as follows: "That this act, in so far as it regulates, or seeks to regulate * * * the size of vehicles and loads, the speed thereof, and makes provision for the

safety of the public and the protection of the highways, and considered without regard to the exceptions, exemptions, and other provisions complained of, is well within the power of the legislature, we need not stop to discuss. *Hendrick v. Maryland*, 235 U. S. 622, 35 Sup. Ct. 140, 59 L. ed. 390; *Morris v. Doby*, 274 U. S. 140, 47 Sup. Ct. 548, 71 L. ed. 967. * * * In other words, short hauls, in which the highways are used in this manner to a limited extent, are excepted from certain provisions of the act. We do not believe that this is either an arbitrary, oppressive, or unreasonable use of the legislative power, nor that it unlawfully discriminates against complainant and interveners.

* * * It is certain that this provision has no just relation to the supposed mischiefs to be remedied, when it is considered that the regulation as to weight is for the protection of the highways, including the bridges, culverts, etc., and persons and property thereon, and that the transportation of a load of one weight, of packages containing more than 30 cubic feet and weighing more than 500 pounds, is no more injurious to the highways, or persons and property thereon, than the same weight load containing a miscellaneous assortment, with packages of less cubic feet contents, or less weight. One is reminded of a catch question, frequently propounded in childhood days, of which is the heavier, a pound of lead or a pound of feathers. We conclude from section 3(f) itself, and the evidence before us, that in this particular, at least, it is unlawfully discriminatory against, and oppressive of, complainant and those interveners who are engaged in the transportation of uncompressed cotton and other similar commodities, and that they are entitled to relief. The injury which will be suffered by them is asserted by them to be most serious; in fact, it is claimed they will be driven from the highways, particularly in so far as the transportation of uncompressed cotton is concerned. * * * The particular fact to be found is whether the commodity or equipment is of such nature as can not be reasonably dismantled. If it is found to be, it is exempt from the requirement as to length, weight, or size, and permit may issue for it to be moved over the highway, but with a well-defined limitation as to route and time. It may be conceded that it is often difficult to define clearly the line between those legislative acts where power to suspend a law is given, or attempted to be given, and those where power of fact-finding or administration is given. We think that section 2 of this act does not violate section 28 of article 1 of the Texas Constitution, and is valid."

While the state may make reasonable regulations for the use

of its highways and the protection of people passing over them, a regulation which is prohibitive of hauling uncompressed cotton over its highways and which is in effect a requirement for compressing cotton before it can be hauled over the highways and not a regulation of the use of such highways will be set aside as unreasonable and an arbitrary interference with the rights of owners of such products to use the highways for marketing them, for as the court said in the case of *McLeaish v. Binford*, 52 Fed. (2d) 151: "Plaintiffs are persons engaged in the business of buying uncompressed cotton in and hauling it over the highways through the above counties to Houston, where they sell or ship it. They haul it in their own trucks which they have license to operate, and which comply in all respects with the general rules and regulations governing the operation of trucks over the highways. * * * Wide as the power of the legislature over the highways is, we have no manner of doubt that, if it arbitrarily interferes with the right of one of the public to haul his goods over it, whether the hauling is done for himself or for hire for others, that one may be, as he has uniformly been, accorded in the national courts, relief. * * * So approaching the statute in the light of the fact which on this record can not be gainsaid, indeed it was established by the affidavits of defendants, and their argument presses it upon us as a beneficial effect of the statute in relieving traffic conditions, that it will drive uncompressed cotton from the highways; and in the light of the further fact which we think the whole evidence establishes, that forcing cotton to be compressed in the interior, if it is desired to move it to the port in more than ten bale lots, will result in its being hauled there by rail, we think it plain, and we so find, that the statute is not a regulation of the use of the highways, but is a regulation as to plaintiffs, of their business of hauling uncompressed cotton with the prohibitory result as to them, of compelling compression in the interior and hauling to market by rail; that instead of making real provision having definite relation and being reasonably adapted to the elimination of the abuses set out in the preamble to the bill, the existence of which on this hearing we have found the proofs fairly support, the statute does no such thing, but, under the guise of regulating, it prohibits owners of cotton from under reasonable regulations hauling their cotton to market, compressed or uncompressed as they may desire, while it leaves the highways open to haulers of all other commodities. This we think the legislature may not do. * * * Though then, upon the present record as made by preamble and by proof, we believe that

the legislature had the power to classify carriers of cotton compressed and uncompressed and impose regulations and restrictions upon their use of the roads reasonably related to and calculated to remove the dangers and abuses which the legislature finds to be attendant upon that movement, we find that the act in question is oppressive as to plaintiffs and interveners because it operates to unreasonably embarrass and restrict to the point of prohibition a legitimate business entitled equally with others to the use of the public roads; and, so finding, we grant the temporary injunction prayed."

Reasonable limitations of size and weight of motor vehicles and their loads operating over the highways are subject to legislative regulation and control by the state in the interest of the public safety and for the protection of its highways, and in making such regulations the state may delegate to its highway department administrative duties for the purpose of determining and preventing violations of the provisions of its regulation. Exemptions from the provisions of such regulations of implementations of husbandry are reasonable and will be sustained by the courts because they are practically necessary and only temporary and infrequent as compared to the ordinary uses of the highways by motor vehicles. Because of the peculiar importance to the state of the transportation of persons in the interest of its social and educational welfare a classification of passenger as distinct from freight traffic is permissible, for as the court said in the case of *Sproles v. Binford*, — U. S. —, 76 L. ed. 1167, 52 Sup. Ct. 581: "Section 2 prohibits the operation on any highway of any 'vehicle,' as defined, exceeding stated limitations of size, or any vehicle not constructed or equipped as required, and also the transportation of any load exceeding the dimensions and weights prescribed. The state highway department may grant permits, for ninety days, for the transportation 'of such overweight or oversize or overlength commodities as can not be reasonably dismantled,' or for the operation 'of super-heavy and oversize equipment' for the transportation of such commodities, provided that hauls under these permits shall be made 'by the shortest practicable route.' Section 3 limits the width of a vehicle including load, to ninety-six inches, the height to twelve and one-half feet, the length to thirty-five feet, and the length of a combination of vehicles, coupled together, to forty-five feet. * * * In enacting the statute, 'the legislature of Texas found as a fact that 7,000 pounds load weight, plus the weight of the vehicle, is the maximum load that should be allowed to pass over the Texas highways, taking into consideration the manner of past and present construction, probable future construction, cost

of maintenance, strength of bridges, condition of traffic, etc.,' and this finding of the legislature is supported by the preponderance of the evidence before the court. * * * In exercising its authority over its highways the state is not limited to the raising of revenue for maintenance and reconstruction, or to regulations as to the manner in which vehicles shall be operated, but the state may also prevent the wear and hazards due to excessive size of vehicles and weight of load. Limitations of size and weight are manifestly subjects within the broad range of legislative discretion. * * * We know of no constitutional distinction which would make such legislation appropriate and deny to the state the authority to exercise its discretion in fixing a net load limit. We agree with the district court that the limitation imposed by section 5 of the statute does not violate the due process clause. The objection to the prescribed limitation as repugnant to the commerce clause is also without merit. * * * The conclusion that the state had authority to impose the limitation of section 5 for the purpose of protecting its highways meets the contention based on the contract clause of the federal Constitution. Contracts which relate to the use of the highways must be deemed to have been made in contemplation of the regulatory authority of the state. * * * If the construction by the district court of the term 'implements of husbandry' is correct, it would follow that the movement would be relatively temporary and infrequent as compared with the ordinary uses of the highways by motor trucks. We think that the exception, in the light of the context and of its apparent purpose, instead of being arbitrary relieves the limitation of an application which otherwise might itself be considered to be unreasonable with respect to the exceptional movements described. We do not find the provision of section 3(c), fixing the same limit of length for individual motor vehicles and for a combination of such vehicles, to be open to objection. If the state saw fit in this way to discourage the use of such trains or combinations on its highways, we know of no constitutional reason why it should not do so. * * * It can not be said that the state is powerless to protect its highways from being subjected to excessive burdens when other means of transportation are available. The use of highways for truck transportation has its manifest convenience, but we perceive no constitutional ground for denying to the state the right to foster a fair distribution of traffic to the end that all necessary facilities should be maintained and that the public should not be inconvenienced by inordinate uses of its highways for purposes of gain. * * * We do not think that it can be

said that persons and property, even with respect to their transportation for hire, must be treated as falling within the same category for purposes of highway regulation. The peculiar importance to the state of conveniences for the transportation of persons in order to provide its communities with resources both of employment and of recreation, the special dependence of varied social and educational interests upon freedom of intercourse through safe and accessible facilities for such transportation, are sufficient to support a classification of passenger traffic as distinct from freight. There is no constitutional requirement that regulation must reach every class to which it might be applied—that the legislature must regulate all or none. * * * Appellants also urge that section 2 is invalid as a delegation of power to the state highway department in violation of section 28, article 1, of the Texas Constitution and of the Fourteenth Amendment of the federal Constitution. We think that the objection is untenable. We agree with the district court that the authority given to the department is not to suspend the law, but is of a fact-finding and administrative nature, and hence is lawfully conferred."

§ 709. **Duty and necessity of states to regulate.**—The past few years have witnessed such an enormous development of motor vehicle transportation that its regulation and control by the states have not begun to keep pace with its growth; in fact only very recently in many of the states and not even yet in several of them has the subject received serious consideration, at all commensurate with its scope and importance. That the states have the legal power and that it is their bounden duty, in the interest of the public service and for the proper future development of our local transportation systems, to regulate the motor vehicle as a common carrier is now generally admitted. The conditions demand early and far-reaching action by the states to secure the best systems of local transportation, based on regulation and coordination rather than on wasteful and inefficient competition. Unnecessary duplication of service and temporary rate cutting results in economic waste and an irregular, impaired service.

§ 710. **Necessity for regulation to insure proper service.**—While the public desires and is entitled to have the best service available, such service must be continuous and comprehensive, for the entire public must be served adequately at all times. Unregulated competitive service by motor vehicles among themselves or in connection with other carriers, which may provide

increased or better service at the same or reduced rates, is neither desirable nor preferable unless such service is permanent and sufficient to serve the needs of the public generally. Service that will not be continuous and adequate for all demands that may arise is not desirable, and should not be permitted to interrupt existing conditions of transportation which may leave the public finally without its necessary service in any form. Regulated service that is coordinated is greatly to be preferred over unregulated competition in this field of public utilities as in all others; for, being natural monopolies, regulation should take the place of competition to avoid needless economic waste and to secure sustained adequate service for all, without discrimination or the exclusion of any from choice or lack of capacity of the carrier. If the new service is an improvement over the old and will be ample and enduring, the public is entitled to it under such conditions with reference to existing service as is feasible and just to all parties concerned.

§ 711. **Benefits of coordinated over competitive service.**—That direct delivery of freight by motor truck at the store door expedites shipments and relieves railroads and interurbans of much congestion at terminals on short-haul and less-than-car lot shipments seems obvious; and serves to illustrate the advantage of the policy of coordinated service between common carriers over that of wasteful competition. In such a field the motor vehicle renders better and quicker service than any other agency, and at less cost; and its use should be encouraged for the public service and the common good of all. This fact is being recognized by several of the large rail transportation systems, for they are themselves providing motor truck service for such shipments to supplement and relieve their own service thus affording better service to all the public at a reduced cost. And while the experiment is a comparatively recent one it seems to be sound economically and satisfactory to all concerned; and if so it will soon become general and very extended in practice.

§ 712. **Advantages of motor vehicle service.**—Just as the electric line relieved the railroads of local traffic and terminal congestion so the motor truck facilitates and relieves other common carriers on short-haul and less-than-car lot shipments. In the same way the motor vehicle is a serious competitor with steam and electric lines in the transportation of passengers, both locally and for long-distance travel. The motor vehicle is the latest and most popular form of local transportation for passengers and freight; and where the public is not already served

adequately it is proving very popular especially in the past few years for its service is quick, comfortable and convenient.

§ 713. **Policy of regulation for state determination.**—Where motor vehicles compete with each other or with steam or electric lines, all the several forms of transportation should be regulated by the state or one of its duly authorized agencies, the municipal corporation or the public utilities commission, in the interest of all parties and with especial reference to the public service. While existing steam or electric lines can not claim to have a franchise which is exclusive of this newer form of transportation by motor vehicles, for no such exclusive franchise can be found by implication, the policy of determining the proper plan of motor transportation presents a problem which demands the best thought and endeavor of which the state or its agency in control of the situation is capable. The question is one of public policy, however, and should be determined by an impartial tribunal of experts on the subject with an eye single to the best interests of the public service; and that plan adopted which will furnish the most desirable service for all throughout the years. The question is legislative and administrative rather than judicial and only when so determined may the courts be asked to pass upon the legality of the action.

§ 714. **Unnecessary additional service undesirable.**¹—The policy of granting motor vehicles permission to operate over certain routes or within a definite area should be determined by the ultimate question of securing safe, adequate and sustained service for the public and of conserving any and all carriers, rendering such service, from wasteful competition by avoiding needless duplication of service. When a field is already properly served to the satisfaction of the public or is not sufficient to support additional service from new forms of transportation by new patronage the policy is generally to refuse to permit new carriers to enter and interrupt the present service.

Where additional service is unnecessary, it is also undesirable, because it would be an unfair interference with the existing, adequate service, which might become unprofitable and be discontinued or so seriously crippled that the public would be inconvenienced rather than served by permitting additional competing service, for as the court said in the case of Cincinnati Traction Co. v. Public Utilities Comm., 112 Ohio St. 699, 148 N. E. 921, P. U. R. 1926A, 338: "Proceeding to consider the evidence

¹This section of third edition quoted in Seaboard Air Line R. Co. v. Wells, 100 Fla. 1631, 131 So. 777.

therefore, with a view to determining whether the findings of the commissions upon the facts are reasonably supported thereby, we find upon the uncontroverted testimony that the route in question is amply supplied with transportation service, since two motorbus lines and an interurban traction company already operate along the route, and since two well-established railroads, which have baggage and other facilities that can never be duplicated in automobile traffic, furnish two trains each way every day along the same route, making all local stops. Moreover, here is a case in which there is not one syllable in the record showing the necessity of increasing the transportation service in this district. The applicant himself refuses to testify that there is any need for granting this certificate to the River Road Transportation Company. It has repeatedly been stated that this court will not substitute its judgment for that of an administrative power created pursuant to an act of the legislature as to matters within its province. Before the court will interfere with an order of the railway commission, or its successors, it must appear from a consideration of the record that the action of the commission was unlawful or unreasonable. *Hocking Valley Railway Co. v. Public Utilities Commission*, 92 Ohio St. 362, 110 N. E. 952. Under the facts herein we feel that the evidence, taken as a whole, is overwhelmingly opposed to the granting of the order. Not only is the present service adequate, but, if the present service is deranged, there is evidence to the effect that the railroad service may be discontinued, and that the already unprofitable service of the interurban street railway may be sadly crippled."

As most of the statutes creating public utilities commissions provide that no certificates for additional service shall be granted unless public convenience and necessity require it, it is generally held that statutes providing for motor vehicle service require the regulation of this service, so that it will not interfere unreasonably with existing services, either as to the initiation of such service or its extension. This principle is clearly stated and discussed as follows in the case of *Scioto Valley R. & Power Co. v. Public Utilities Comm.*, 115 Ohio St. 358, 154 N. E. 320, P. U. R. 1927C, 186, where the court said: "The statute further specifies that before granting any certificate the commission shall consider other existing transportation facilities in the territory for which a certificate is sought, and in case it appears from the evidence that the service furnished by existing transportation facilities is reasonably adequate, the commission shall not grant such certificate. Section 614-87, General Code. In other words, the

spirit of the Motor Transportation Act is not to permit unrestricted motorbus operation at the whim of an operator, or upon the mere permission of the commission acting at will, but only in accordance with public needs and public service. * * * It would be anomalous to hold that the commission is bound to consider existing service and public convenience and necessity in cases where it issues original certificates, and may permit the service to be extended regardless of such necessity. * * * It was therefore error upon the part of the commission not to order the transit company to desist from this illegal operation, and in the failure to make such order the commission acted unreasonably and unlawfully. Since there is adequate common-carrier transportation service between Columbus and Lancaster, independent of the proposed change and increase in service, and since the public utilities commission failed to order the Ohio Transit Company to desist from using equipment not authorized, the order of the public utilities commission as to increase of schedules and seating capacity between Columbus and Lancaster must be and hereby is reversed."

A decision of the public utilities commission, having before it all the applications for additional service, in selecting one applicant over the others which in its discretion and best judgment can best serve the public convenience and necessity, will be sustained by the courts, unless its action is unreasonable and arbitrary, for as the court said in the case of *Sohnngen v. Public Utilities Comm.*, 115 Ohio St. 449, 154 N. E. 734: "The question to be determined under such circumstances is one calling for the sound judgment and discretion of the commission, and where at the time of the hearing it has before it the applications of various transportation companies covering the same routes, or routes traversing and serving the same territory, it is authorized to determine which of the applicants can best meet the requirements of the public convenience and necessity, and where it does not affirmatively appear from the record that it has acted unreasonably or unlawfully its order will be affirmed, *Royal Green Coach Co. v. Public Utilities Commission*, 110 Ohio St. 41, 143 N. E. 547."

This same court in another case indicated the necessity of publishing notice of a hearing by the public utilities commission in each locality where the applicant for a certificate proposed to operate, and the further necessity of a showing that the proposed service was not merely a public convenience, but that it was also a public necessity for the public generally, and not merely a small portion of it, for as the court said in the case of *Lake*

Shore Electric R. Co. v. Public Utilities Comm., 115 Ohio St. 311, 154 N. E. 239, P. U. R. 1927B, 549: "Inasmuch as the operation is authorized in every county of the state and over every highway in the state, whether improved or unimproved, and over streets in every city and village in the state, the statute can not be said to have been complied with by publication made only in newspapers having general circulation in all the counties of the state but publication must necessarily be made in some newspaper published at each of the county seats of the eighty-eight counties of the state. The statute gives the alternative of publishing in newspapers published in each of the county seats or 'in one newspaper published in and of general circulation throughout the territory in or through which the applicant proposes to operate.'

* * * In this case it can not be said that there has been a substantial compliance, but rather it must be said that there has been a total failure to observe the requirements. * * * The statute requires that the commission shall find that there is not merely a public convenience to be served, but also a public necessity. It may therefore be inquired whether the service is one which the public reasonably requires or is something which a small portion of the public desires. * * * We are therefore confronted with the fundamental inquiry as to whether or not this is transportation of such public character as to come within the purview of the regulatory statutes. * * * The order of the commission will therefore be reversed."

§ 715. Additional necessary service should be coordinated and controlled.²—When new applications are made to serve any particular field the applicant which is responsible and able to render the most satisfactory service at the best rate is naturally entitled to the permit. Duplication of service in new territory or increased capacity for a growing field, requiring additional service, should be properly regulated to prevent economic waste by providing only required service. Competition as an ultimate means of control and regulation is expensive and fails to accomplish the desired end of properly serving the public at minimum cost. Other things being equal the existing or first applicant should be favored and protected in any field so long as proper service is given and fair rates maintained. That common carrier is preferable which offers the safest and most satisfactory service at the most reasonable rate and on a responsible financial basis, for this will secure continued and sustained service throughout the years to come. When, however, the field is suf-

²This section of the third edition cited in *Seaboard Air Line R. Co. v. Wells*, 100 Fla. 1631, 131 So. 777.

ficient to support more than one agency or form of service or where the demands of the public are sufficient to justify a number of carriers or to require different forms of service, permits for more than one may properly be granted if the service is coordinated and controlled.

An order of the railroad commission, granting its certificate authorizing motor vehicles to render service as common carriers in addition to the present service, will be set aside where public convenience and necessity do not really require it; and even where additional service may be required, the present service should be extended or enlarged rather than permit another company to enter the field, because a unified, coordinated and continuous service is in the interest of public convenience and necessity, which can generally be best served by one, rather than by a number of companies, under the proper regulation and control of the commission. Statutes in this connection generally contemplate and frequently expressly require that additional new service from a different source shall not be permitted to supersede or vitally impair the present transportation service, where that is or may become adequate to the public needs. Existing investments should be conserved, and present service protected, where adequate and satisfactory, in the interest of justice and the public welfare; and while the question of the necessity for new or additional service is one of fact, its construction and application in each case should be reasonable and practicable in view of all the present and near future conditions and demands for public service. This general principle and the various practical aspects of its application are discussed at length and with convincing force as follows in the case of Seaboard Air Line R. Co. v. Wells, 100 Fla. 1631, 131 So. 777: "The immediate question presented by this case is whether under the statute the evidence showed that the 'public convenience and necessity' justified or warranted the permission granted by the commission for the operation of the motortruck line applied for. But we must not close our eyes to the fact that back of and underlying this immediate question is the ultimate and basic question whether 'the public convenience and necessity' mentioned in the act could reasonably be construed to require or justify the scrapping or serious crippling of the railroads of this state, where they are already rendering adequate service, and all that is reasonably necessary, to meet the needs of the territory in question. * * *

The statute assumes that there may be many cases where the public convenience and necessity will be promoted by granting certificates to motor transportation companies. It may well be

freely admitted that the statute assumes that the motor vehicle has its place in the general transportation system of the state. It is a popular, and in many cases a convenient, form of transportation, especially as to local transportation. And the statute manifestly contemplates that, where the public is not already adequately served by established carriers, either by rail or motor vehicles, and the public convenience and necessity demand it, certificates authorizing motor transportation by bus or truck may be granted, in spite of the increased burden upon the public highways and the increased dangers to ordinary traffic resulting.

"There may be cases, for instance, where the evidence discloses that the railroad carriers are suffering from congestion at terminals by reason of the accumulation of short-haul and less-than-car lot shipments, which congestion could be adequately relieved by permitting the operation of motortruck lines as supplementary to the service of the overcrowded railway; but there is no such evidence in this case. There may also be cases where even duplication of service may be required where the existing service is inadequate to meet the public needs, or to handle the rapidly increasing business offered by a new and growing field. See Pond on Public Utilities, section 715. But there is no such showing here. This case presents an effort to secure authority to operate a truck line over a highway built and maintained at public expense, which highway runs side by side with a long-established rail line for a distance of 170 miles, and thereby to haul freight in competition with the already reduced freight and express business carried on over such rail line, thus threatening the latter with a further serious reduction in its revenues; and this effort was made in the absence of any showing that the railway company in connection with the express company was inadequately equipped, or was otherwise unable or failing to handle the business in such a way as to reasonably meet the needs of the public; or, in the language of the statute, without any showing that the 'public convenience and necessity' required the granting of such additional service.

"The Pennsylvania public service commission in the case of In re Houser, P. U. R. 1922B, 383, said: 'By reason of the large capital investment in rail transportation, some of these companies have continued to operate in the face of an accumulating deficit, rather than to surrender their franchise and scrap their properties, in the hope and expectation that conditions would so change that they would be able to operate at a profit. So long as a railroad or railway company retains its franchise to operate it may be compelled to do so. A motor company, with its com-

paratively small investments, without suffering any serious loss, can surrender its franchise and cease to operate at will.'

"In the case of *In re James*, P. U. R. 1923E, 857, the public service commission of Vermont made the following interesting observations: 'The motor vehicle has revolutionized local travel and the public motor bus for the carriage of passengers and parcels has become a necessity to many communities not otherwise adequately served by public conveyance of any kind; but there are certain localities in the state where the traveling public is already so amply provided with other forms of conveyance that any new service, like the bus service, is uncalled for. There are also localities where several bus lines may seek to operate where the entire carrying business could be fully supplied by a less number. The motor bus operates upon the highway. The state of Vermont and the federal government have expended large sums of money in order to prepare the proper road bed to meet the new conditions of travel which the motor vehicle has called into being. This outlay, and the highways which have been provided by these means, are used by the motor bus in common with other motor vehicles and horse-drawn vehicles without expense, save the small license fees which it pays to the local and federal government. Travel upon the principal highways of the state has increased to such an extent, that, in many places, the highways are worn out so rapidly that it has become necessary to expend sums heretofore undreamed of for the construction of permanent highways of a stability sufficient to sustain the accumulated business, and the crowding of traffic in the principal places of business has become such that it is necessary to station traffic officers and set up monuments in the highways to regulate and control the direction and speed of the different kinds of vehicles. * * * The common carrier has always been considered subject to legislative control and regulation, having reference to the needs of the public, and when the legislature placed motor buses within this class it must have intended to subject the newly constituted common carriers to the same control and regulation as other members of the same class. It seems to us that the members of the legislature in passing this act did so under the belief that the time had come to determine in a formal way to what extent our highways should be used by the business under consideration, and to limit that use to the public need.' * * *

While there was some evidence in this case tending to show that the proposed operation of the truck line would be a convenience to some individuals, there was no evidence showing that there was any real public necessity for its operation, when the service

afforded by the railway and express companies is taken into consideration. We have therefore reached the conclusion that the order providing for the issuance of the certificate in this case, on the showing made, was not in keeping with the spirit or letter of the statute, and hence constituted 'a departure from the essential requirements of the law.' "

§ 716. **Commission control in lieu of competition.**—Competition of motor vehicles with steam and electric systems of transportation necessarily affects the revenues of all, and in fixing rates and determining the policy of such new or additional service the capacity and responsibility of the party proposing to render the service, and the requirements of the public, present and prospective, all require serious consideration and the exercise of the greatest foresight. The motor vehicle has demonstrated its advantages and the public desires and is entitled to this service. The growth of this form of transportation has been phenomenal, as has been the policy of commission regulation and control in lieu of competition as the better form of securing proper service at reasonable rates. And while our theory of public regulation has been developed altogether in the past half century, commission regulation of public utilities, except railroads, has been developed into a general and practically universal system in the past twenty years. It is now the established form of regulation throughout all jurisdictions and has justified itself socially and economically as well as legally.

As commission control has generally supplanted competition in the operation of public utilities, the right of the commission to regulate and control the use of the highways in the interest of the public convenience and safety by those who desire to prosecute their business thereon is now generally recognized, and the importance of such control in the interest of the public welfare, as well as in justice to the existing lines offering similar public service is fully realized, for as the court said in the case of *Box v. Newsom* (Tex. App.), 43 S. W. (2d) 981: "No man has any more right, as a matter of right against the state, to set himself up for the transaction of a business for gain on the public highway of the state than he would have to transact a like business on the streets of an incorporated municipality. The legislature has a right to regulate and control the transportation of freight for hire over its highways in the interest of public convenience and safety and for the protection of the highways, for the proper use of which it is trustee to the public, and such regulatory measures when reasonable, have been uniformly sustained. * * *

From this it is apparent that the appellees were not entitled to

the permits merely because they had filed an application therefor and complied with the other preliminary provisions entitling them to a hearing thereon. A trial before the commission was a necessary prerequisite to the permit. *Metropolitan Life Ins. Co. v. Love*, 101 Tex. 444, 108 S. W. 821, 1157."

§ 717. **Public benefits of uniform local fares.**—Better service, more widely distributed, which permits of municipal growth and development and prevents congestion and the existence or growth of slums in our cities, has been encouraged by commission control, while at the same time economic waste has been avoided and investments conserved; thus affording safe, sustained service at more reasonable rates than could have been secured under competitive conditions. Unrestricted competition would have destroyed some of the older systems of transportation which are still necessary to the public service. A uniform fare for street transportation encourages the expansion of urban population, which is highly desirable socially, and which a mileage basis of fixing fares would defeat. And to continue to encourage the further development of such conditions, the jitney which naturally prefers to cater to short-haul traffic must be regulated with reference to the present street car service, which can only be furnished at a uniform, minimum charge on condition that the short-haul fare helps to carry the long-haul business into the less settled and growing territory on the outskirts of the city. Any desirable single system of municipal transportation must cover the entire city and be fully equal to any growth that may reasonably be contemplated, and with more than one system they should be coordinated and supplemental.

§ 718. **Local transportation systems.**—Individual initiative and foresight and the ability and courage to make large investments through private enterprise, which has secured the modern conveniences now afforded by urban transportation systems, has proved the only available agency thus far for furnishing this public utility service in most cities. These systems and the large investments which sustain and make their continued service possible must be duly considered if the public at large is to have proper service. At the same time, however, in the interest of better service for the public the motor vehicle with its phenomenal development and attractive features must be fairly recognized and afforded full opportunity to develop and extend to its greatest capacity, especially in fields not already fully occupied.

§ 719. **Motor vehicles as local carriers.**—After careful study and full consideration it has been determined in several states that motor vehicle transportation exclusively for the larger cities

would not prove practicable or economical, and that the congestion of traffic under such a system would make it prohibitive. Such service is now permitted in most instances on a coordinated rather than a directly competitive basis so far as it has been controlled; although as yet the question is an open one and there is a wide diversity of opinion, with each case being considered on its own peculiar facts and decided on its merits and with little attention to precedents, of which naturally there are as yet only too few.

§ 720. **Motor vehicles as feeders for additional service.**—Inadequate street railway service or the failure to serve for any reason affords the best justification for permitting and encouraging additional service by motor vehicles, and this form of transportation for urban or interurban service is generally conceded to be desirable as feeders to existing systems and may properly be provided to supplement, albeit not to supplant, such systems so long as they afford proper service at reasonable rates. Drawing the line of cleavage between such forms of transportation systems, however, is most difficult and demands the highest sense of justice and fair dealing, and the exercise of the clearest foresight.

§ 721. **Interurban and interstate motor coach service.**—The motor coaches now provided for interurban and interstate service are proving very popular, which is the final test of their fitness and the reason for their remarkable growth. One of the most outstanding developments in transportation has been the growth of motor vehicles as common carriers. With the extensive improvement of our state highway systems and the paving of many additional roads each season, the cities are becoming more accessible to all sections of the country. Large comfortable motor buses or coaches are now operating regularly between established terminals on fixed schedules out of most of our cities; thus bringing the city and country together and greatly facilitating their business and social relations.

§ 722. **Concurrent growth of highway systems and motor service.**—In the state of Indiana alone, there are in active operation one hundred seventy-six motor bus lines, which operate over most of our extended and rapidly growing highway system. It is impossible even to estimate with any accuracy the development of this form of transportation for the next few years, but it will probably keep pace with the unprecedented growth and extension of our improved highways under the very popular plan of constructing them from a tax on the sale of gasoline, supplemented by federal aid funds. These indirect

taxes are not felt as a burden by anyone and yet they are sufficient to pay for the highways as they are built which is an exceedingly popular plan and is securing a very large mileage of new paved highways each year. In fact present indications would justify the belief that practically all our main highways, except those in the most thinly populated sections, will be paved within the next five or ten years. And if, as seems equally probable, the motor vehicle as a common carrier of passengers and freight continues to develop at its present rate of growth, the question of its proper regulation and control will be second to none in its scope and importance as a modern transportation problem.

A tax levied on motor vehicles for the building and maintenance of state highways is the most common, convenient, equitable, and easily collected of any known method of taxation for this purpose, and statutes, providing for raising the revenue by this method, are generally sustained by the courts which permit the state to require particular localities, such as counties, to impose such a tax under proper statutory authority, as is indicated in the case of *Frazier v. Lindsey*, 162 Tenn. 228, 36 S. W. (2d) 436, where the court said: "The power of the legislature to impose a special tax of this nature on a particular county is now so well established that it is only necessary to cite a few recent decisions dealing with this question. It is said that the tax is arbitrary because the owner of a Ford car is required to pay the same amount as the owner of a Cadillac car. We consider the classification a reasonable one. * * * It is stated by counsel that this act is very unpopular in Benton county. We have never heard of any statute being popular that exacted taxes. That, however, is a matter as to which this court is without power to grant relief. The remedy of the taxpayer is an appeal to the legislature. The legislature has enacted many laws of this character, and we see no basis for holding them illegal. Roads can not be constructed and maintained without money, and the only means of acquiring it is by taxation."

A tax of a certain per cent of the gross receipts of motor vehicles operating as common carriers over regular routes and between fixed termini upon the public highways will be sustained as a reasonable regulation or charge for the privilege of using the highways; and such a classification will be permitted because of the nature and extent of the traffic involved, as is indicated in the decision of the Supreme Court of the United States in the case of *Bekins Van Lines v. Riley*, 280 U. S. 80, 74 L. ed. 178, 50 Sup. Ct. 64, where the court said: "Appellants, as common carriers, are engaged in transporting freight by motor vehicles for

hire along public highways between fixed termini and over regular routes within California. The 1926 Amendment to the Constitution and the statutes of that state lay upon such carriers a tax of five per cent of their gross receipts in lieu of all other taxes, while other freight carriers, common and private, by motor vehicles, are subjected to different and, it is alleged, less burdensome taxation. * * * The power of a state in respect of classification has often been declared by opinions here. We are unable to say that there was no reasonable basis for the one under consideration; the court below reached the proper result; and its decree must be affirmed. Appellants voluntarily assumed the position of common carriers operating between fixed termini and enjoy all consequent benefits. That a marked distinction exists between common and private carriers by auto vehicles appears from *Frost & F. Trucking Co. v. Railroad Commission*, 271 U. S. 583, 70 L. ed. 1101, 47 A. L. R. 457, 46 Sup. Ct. 605, and *Michigan Pub. Utilities Commission v. Duke*, 266 U. S. 570, 69 L. ed. 445, 36 A. L. R. 1105, 45 Sup. Ct. 191. Sufficient reasons for placing common carriers, operating as appellants do, in a special class, are pointed out by *Raymond v. Holm*, 165 Minn. 215, 206 N. W. 166 (Dec. 4, 1925); *State v. Le Febvre*, 174 Minn. 248, 219 N. W. 167 (April 13, 1928); *Iowa Motor Vehicle Assn. v. Railroad Comrs.*, 207 Iowa 461, 221 N. W. 364 (Sept. 28, 1928); *Liberty Highway Co. v. Michigan Pub. Utilities Commission (D. C.)*, 294 Fed. 703. Their use of the highways probably will be regular and frequent and, therefore, unusually destructive thereto. Also it will expose the public to dangers exceeding those consequent upon the occasional movements of other carriers."

This same court in a later case sustained a requirement that all motor vehicles operating over the state highways must register and pay a fee for the privilege of using the highways, for as the court said in the case of *Carley & Hamilton, Inc. v. Snook*, 281 U. S. 66, 74 L. ed. 704, 50 Sup. Ct. 204: "Upheld the constitutionality of section 77 (b) and (c) of the Motor Vehicle Act of California, 1923 California Statutes, chapter 266, as amended, 1927 California Statutes, chapter 844. Section 36 (a) requires every motor vehicle operated upon the public highways of the state to be registered. * * * Whatever other descriptive term may be applied to the present registration fees, they are exactions, made in the exercise of the state taxing power, for the privilege of operating specified classes of motor vehicles over public highways, and expended for state purposes. Such fees, if covered into the state treasury and used for public purposes, as are general taxes, obviously would not offend against the due

process clause. Nor can we see that they do so the more because the state has designated the particular public purposes for which they may be used. There is nothing in the federal Constitution which requires a state to apply such fees for the benefit of those who pay them. * * * The present registration fees can not be said to be tolls in the commonly accepted sense of a proprietor's charge for the passage over a highway or bridge, exacted when and as the privilege of passage is exercised. * * * Such fees were a common form of state license tax before the Federal Highway Act was adopted in 1921. That act contemplated the continued maintenance by the states of state highways, constructed with federal aid, the expense of which must necessarily be defrayed from revenues derived from state taxation. It can not be supposed that congress intended to procure the abandonment by the states of this well-recognized type of taxation without more explicit language than that prohibiting tolls found in section 9."

§ 723. **Coordination of steam, electric and motor systems of transportation.**³—The proper adjustment of the service of motor vehicles operating as common carriers to that of rail and electric carriers is of the greatest importance and requires early attention and a practicable and equitable solution. Already some railroads are seriously considering the abandonment of many miles of their lines, while others are using motor vehicles themselves as feeders of both freight and passenger business for their own rail system. And the same is true of electric interurban lines, some of which are now operating their own motor buses even parallel and in direct competition with their rail service to prevent other motor vehicle lines from operating in direct competition, and to give the public the kind of service it demands. These different cases of unregulated competition illustrate conclusively the necessity for a proper regulation and control of all common carriers to avoid the extravagant waste of free competition and the consequent loss of investments and the ultimate failure to secure satisfactory service at proper rates. The situation can best be met and finally solved by impartial state and federal regulation; substituting a coordinated or cooperative service in the place of the wasteful duplicated service afforded by unregulated competition.

§ 724. **Equitable relations of different systems.**—While motor trucks as carriers of freight have been used for several

³This section of the third edition quoted in *Gilmer v. Public Utilities Comm.*, 67 Utah 222, 247 Pac. 284.

years, the motor bus or the commodious motor coach as a common carrier of passengers between municipalities for long distances and under conditions of safety, speed and convenience is a comparatively recent development. However, if the competition between steam and electric lines, and motor carriers is to be maintained on a fair and equitable basis, and along sound economic lines, which will insure permanence in the plan, the motor vehicle must pay its fair share of the cost of constructing and maintaining the streets and highways over which it operates.

The necessity for the regulation of the speed of motor vehicles on the streets and highways of the state, and especially in congested areas of population, is generally recognized as presenting a problem of serious and increasing difficulty, so that any reasonable statutory or municipal regulation in the interest of safety is sustained by the courts, as is indicated in the case of *Snyder v. Campbell*, 145 Miss. 287, 110 So. 678, where the court said: "To drive a motor vehicle on the streets of a city at a rate of speed of fifteen miles per hour under some conditions of weather and traffic may be negligent, and a violation of the Motor Vehicle Act, and, we think, under the proof in this record, the question of whether the driver of the automobile was guilty of negligence was one for the jury to determine. * * * The proper control and regulation of traffic on the highways and at the congested centers of population is a problem of increasing difficulty, and one which is taxing the best thought of the governing authorities of our municipalities, and, since the advent of the motor-driven vehicle and other means of rapid transit, the great increase and concentration of population and traffic makes regulation of such traffic absolutely necessary for the protection of human life and of property, and, in order to make such regulations effective, the right to control the movement of pedestrians on the streets at the congested centers of traffic must be recognized and exercised. Regulations designating points for crossing streets and controlling the movement of pedestrians on the streets where population is concentrated and traffic is heavy, which, before the advent of the automobile and the great increase of population, business, and traffic, would have been arbitrary and unreasonable, may now, by reason of the changed and complex conditions, be entirely reasonable, and, in fact, necessary for the proper protection of life and property."

§ 725. **Special highways for motor service.**—The automobile is no longer merely a horseless carriage and the road for motor vehicles can not continue to be merely a horseless highway. Practically everything we use is now transported sometime in

motor cars or trucks and an ever increasing number of passengers are being carried in motor buses or coaches. The nature and extent of this service today and every indication of its increasing rapidly in the coming years justifies the belief that we must have one-way traffic on through motor roads, used exclusively for motor transportation; permitting speed with safety, and avoiding the ordinary miscellaneous traffic and congestion.

§ 726. **Gasoline taxation of motor vehicles.**—The tax now levied by some states on the sale of gasoline of a few cents per gallon is fair and easily collected through the gasoline sales agencies, and when supplemented by the federal aid available, is sufficient to provide for the rapid paving of our highways. Gasoline consumption is the most equitable measure of the use of the highways by motor vehicles and the best test of the capacity and the necessity to provide revenues for building and maintaining our highways. It may be almost automatically levied and collected through the general distribution agencies; and the labor and expense of securing millions of dollars of funds for this purpose is reduced to the minimum by means of a gasoline tax. The plan also taxes the nonresident citizen using the highways of another state, which the automobile license system of taxation often fails to reach. This licensing system is graduated according to weight and horse-power of motor vehicles and the tax fixed on this basis is often inequitable and arbitrary, as such classification fails to measure the extent to which roads are used or destroyed by the taxpayer. This plan, however, is probably as feasible as any that might be devised for taxing motor vehicles as such; but the tax on gasoline consumption is a tax on the use of our streets and roads by such motors and is the simplest and most equitable plan of paying for highway construction and maintenance. Of course all net revenues raised by taxes on gasoline sales and from licenses on automobiles should be expended on our street and highway systems. The overhead expense of collecting the gasoline tax is only nominal, probably not over one or two per cent of the revenue thus raised which even at a very small rate aggregates several million dollars annually in the average state.

Statutes requiring the payment of motor vehicle license fees and gasoline taxes to provide funds for highway purposes are generally recognized as legitimate methods for raising funds with which to build and maintain state highways. This is probably the most equitable and popular way for raising highway funds, because they are paid by those who enjoy the benefits of the improved highways and generally in proportion to the extent

this privilege is enjoyed, as the license fees are usually graduated according to the size and capacity of motor vehicles and the tax on gasoline is naturally the amount used in traveling over the highways. This principle is established and discussed as follows in the case of *State v. Moorer*, 152 S. Car. 455, 150 S. E. 269: "A study of the authorities has thoroughly convinced me that the application of the rule laid down in the second proposition of the proposed opinion does not establish the unconstitutionality of the act in question, for the reason that the discretion as to which method of financing shall be followed is essentially an administrative act and does not give the commission any authority to say what the law shall be. * * * The highway commission is given no power to add to, or to take away from, the law as enacted, and nothing is left to the discretion of the commission as to what shall constitute the form or substance of the statute. The basic subject-matter of the act is the completion of the construction of the state highway system, and the two alternative plans of financing the work, each complete in itself, are merely parts of that subject. The authority conferred upon the commission, in the option given it to select either of the plans, is an authority or discretion as to the execution of the law, being merely a choice of a method of procedure for carrying out the purpose of the act, and is nothing more than provision for efficient execution and administration of a finished statute. This power is similar in principle to that which, as we have seen, has often been delegated to public officials or boards with the approval of the courts. It is also contended that the act is invalid as it undertakes to provide an appropriation of the proceeds of the gasoline tax and motor vehicle license fees for an indefinite number of years, in violation of section 2 of article 10 of the Constitution. Under our form of government the legislature is given plenary power in the matter of taxation, subject, of course, to express constitutional limitation. * * * As the appropriations contemplated by the act under consideration relate to a 'certain special fund,' the gasoline tax and the motor vehicle license tax, the present case is clearly brought within the rule declared in the *Briggs* case, 137 S. Car. 288, 135 S. E. 153, which settles the question adversely to the contention of the petitioners. * * * The only decision of this court construing the restrictions upon the creation of a state debt which seems to throw any light upon the present problem is the decision in the *Briggs* case, upholding reimbursement agreements. In that case it was held that the state's indebtedness to a county or road district under a reimbursement agreement, being payable exclusively from a special

fund derived from sources other than a general property tax, was not within the meaning of the constitutional provisions relating to creations of debts of the state. * * * It is evident that only by complete repudiation of the former holding of this court can the act in question be declared unconstitutional; and I, for one, am not prepared, without urgent reasons or clear manifestation of error, to abandon a doctrine or principle declared by this court to be sound and the law of this jurisdiction, and to substitute therefor the decisions of the courts of other jurisdictions, which, though deserving of respect, are in no way binding upon us. The decisions in the *Evans v. Beattie*, 137 S. Car. 496, 135 S. E. 538, and *Briggs* cases were not arrived at over night, but were the result of many weeks of careful study, investigation, and consideration. * * * Since the decisions in those cases, and in reliance on them, approximately \$30,000,000 additional county and district obligations have been issued and are now outstanding. All of these millions of county and district bonds are secured by the obligation of the state to repay the counties and districts out of the public moneys to be collected in future years from license fees and gasoline taxes."

As the state may tax as a matter of regulation or for revenue, motor vehicles may be required to pay a reasonable tax for operating over the state highways, and, for the purchase of gasoline for such purposes, may be required to pay a reasonable fee for the regulation of its storage and sale, as is indicated in *Miami Transit Co. v. McLin*, 101 Fla. 1233, 133 So. 99, where the court said: "It is contended that the act imposing the license and registration fee is regulatory and that, as the fee is greater than the cost of regulation, such fees would create a surplus, and that the act being a revenue act, it is not enacted in the exercise of police power and for such reason is void. This contention of the appellant is not tenable. The fees here imposed, like those fees which we had under consideration in the case of *Jerome H. Sheip Co. v. Amos*, decided October 17, 1930, reported 130 So. 699, 705, are imposed under taxing power being exerted both for revenue and regulation. * * * "There is no inherent right to use dangerous property without restraint. The noxious and highly inflammable character of gasoline, particularly when stored in large quantities, is common knowledge. The state has the power to regulate that species of use of it, as well as the sale of it, by the imposition of an excise either in the exercise of the police power, the taxing power, or both. See *Texas Co. v. Brown*, 258 U. S. 466, 42 Sup. Ct. 375, 66 L. ed. 721. One lawful method of regulation is by means of an excise for revenue

purposes upon the privilege of storing it, which is the tax before us. The taxing power may be exerted for either regulation or revenue, or for both purposes.' * * * This court, as well as the courts of other jurisdictions, has come to uniformly hold that a motor vehicle operated over the highways is a dangerous instrumentality. * * * The motor vehicle, when operated on public highways, being a dangerous instrumentality, the regulation of the use of such vehicles is a proper matter of police power inherent in the state. The appellant has not made it to appear that in the statute complained of the legislature has exercised this power in such an arbitrary and unreasonable manner as to bring it in conflict with any of the provisions of organic law."

As a method of maintaining its streets and highways, the state has a right to impose a tax on the sale of gasoline when used in propelling motor vehicles thereon in addition to its general right of taxation, and as the state has the power to tax generally and the right to regulate traffic over its highways, such a gasoline tax may be imposed in home-rule cities, for as the court said in *People v. Denver*, 90 Colo. 598, 10 Pac. (2d) 1106: "The general assembly had the power, and exercised it, to tax gasoline used in propelling motor vehicles on the streets of home-rule cities, just as it had such power to impose a tax on counties and municipalities proper and upon individuals, and that it has done so in this act of 1929. In answer to the second question, we answer, yes, that the general assembly intended to impose such a tax on home-rule cities. * * * The streets and highways of Denver are public highways of the state. Every citizen of the state of Colorado or the United States has a right to travel upon them. There certainly is no express provision in article 20 that makes the streets of Denver merely local highways for the use of the residents or citizens of Denver alone. The people of the state, as stated, have the undoubted right to use them as have citizens and residents of other states."

The power of the state to impose a tax on the sale of gasoline, even when used in interstate commerce, is fully recognized because the tax is a business tax for the privilege of conducting an intrastate business. The purchase of supplies or equipment, used in conducting a business, constituting interstate commerce, is not exempt from local or state taxation any more than the production or sale of any product which may become an object of interstate commerce. That such a sales tax or a general property tax may be imposed by the state is the effect of the decision in the case of *Eastern Air Transport Co. v. South Carolina Tax Commission*, — U. S. —, 76 L. ed. 673, 52 Sup. Ct. 340,

where the court said: "This suit was brought to restrain the collection of a tax, imposed by the state of South Carolina, of six cents a gallon with respect to gasoline purchased by complainant in that state and used by complainant in interstate commerce. The complainant charged that the state act placed a direct burden upon interstate commerce and hence was repugnant to the commerce clause of the federal Constitution. * * * The tax is described in the statute as a license tax which, as applied in the instant case against the dealer, is for the privilege of carrying on the business of selling gasoline within the state. The tax is thus imposed upon the seller and the sales in question are intrastate sales. * * * If such a license tax for the privilege of making sales within the state were regarded as in effect a tax upon the goods sold, its validity could not be questioned in the circumstances here disclosed, as in that aspect the tax would be upon a part of the general mass of property within the state and hence subject to the state's authority to tax, although the property might actually be used in interstate commerce. * * * But the mere purchase of supplies or equipment for use in conducting a business which constitutes interstate commerce is not so identified with that commerce as to make the sale immune from a nondiscriminatory tax imposed by the state upon intrastate dealers. There is no substantial distinction between the sale of gasoline that is used in an airplane in interstate transportation and the sale of coal for the locomotives of an interstate carrier, or of the locomotives and cars themselves bought as equipment for interstate transportation. A nondiscriminatory tax upon local sales in such cases has never been regarded as imposing a direct burden upon interstate commerce and has no greater or different effect upon that commerce than a general property tax to which all those enjoying the protection of the state may be subjected."

§ 727. **Motor vehicles as common carriers.**—Regulation of motor vehicles by the states so far as it has been developed is naturally statutory, and accordingly varies in the different states. Under most of these statutory regulations motor vehicles which are common carriers are regulated under general statutes covering common carriers which conduct commercial enterprises available to the general public. In a rapidly increasing number of states the subject has become one of special legislation, which undoubtedly will be very general throughout the country.

Under special legislation, the courts permit classifications according to the weight, passenger, and power capacity and tire equipment, whether solid or pneumatic, as well as the use and

extent to which the transportation service is rendered, whether by the public generally for personal service or for service to the general public for compensation. In most cases, the object is two-fold—regulation of the traffic in the interest of public safety, and for the purpose of raising revenue to build and maintain the highways; and whether for one or both purposes, the statutes are generally sustained so long as the classifications and charges or fees are reasonable. An interesting discussion of this principle and its application in the matter of defining what constitutes reasonable classifications is furnished in the case of *State v. Overstate Transp. Co.*, 101 Fla. 1143, 132 So. 825, where it was said: "The statute imposes upon passenger motor buses operated or driven upon the highways of this state a charge upon each bus with seating capacity over seven, exclusive of driver, per one hundred pounds (or major fraction thereof) gross weight, pneumatic tires \$1.50, solid tires \$3, and in addition a charge for buses per passenger capacity, over seven and not over sixteen, driver excluded, \$10 each; over sixteen, driver excluded, \$15 each. Sections 1281, 1285, Compiled General Laws. * * * There is a proper basis for a classification between the use of the highways for transportation by the public generally and their use in the business of transportation for compensation; the charge is the same for buses that are operated only on the Florida side of the state line which excludes discrimination; the charge is not upon interstate commerce, but for the authorized use of all the public roads of the state, and is not unreasonable even though the privilege be exercised only on a small part of the state road."

In the construction of what constitutes proper exemptions from the provisions of a statute requiring the payment of a license fee from motor vehicles, operating as common carriers, or engaging in commercial enterprises on the public highways, the courts are generally liberal in excluding school buses, agricultural and horticultural enterprises, and the postal service, because these are not strictly commercial, nor are they available to the public generally, but each serves a special, personal or private rather than public purpose. This principle is defined and discussed as follows in *Allred v. J. C. Engleman, Inc.* (Tex. Civ. App.), 40 S. W. (2d) 945: "It may be assumed from the allegations that the trucks were used solely to convey water from the source of supply to the farm, to be placed thereon to sustain the life of the young trees. Appellants seek to obtain the license fee from each of the trucks. * * * There is nothing of a commercial nature attached to the use of the trucks, but they are

being used as implements of husbandry for the protection of crops on the farm. Even if there were doubts as to whether the trucks should be exempted under the terms of the statute, the doubts should be resolved in favor of the preservation of the crops of the farm. The operation of the enterprise of opening up hundreds of acres of citrus fruit land to cultivation and adding to the material wealth of the state should not be hampered, if not destroyed, by a too strict construction of the statute."

Classification in the regulation of the use of state highways by motor vehicles requiring the payment of a tax to provide highway funds, according to horse power, which is one way of measuring capacity or weight, is legitimate and generally sustained, as is indicated in the case of *Lee v. State*, 163 Ga. 239, 135 S. E. 912, where the court said: "Referring especially to the contention that the attempted classification according to horse power is purely arbitrary and fixed without regard to value or use, and that there is 'no connection between the reasons for the classification of automobiles by horse power except the arbitrary statements made in said act and amendments thereto,' we will only say that the classification does not seem to us to be 'purely arbitrary.' * * * While the funds arising from the tax imposed by this act are for the improvement of roads outside the cities, it can not be asserted and maintained that the mercantile class, the manufacturers, and others living in the cities are not as much benefited by the improvement of the roads in the country as those who live out in the country along those roads. Besides, the residents of the city, either for pleasure or business, will constantly traverse the roads beyond the limits of the city. * * * We do not think that in view of all the provisions of the act it can be classed as a revenue law. It is true that a large amount will be derived from it, and that the sum collected from the tax is largely in excess of any sum needed to carry out and enforce the law governing registration. But the excess revenue derived from the tax does not become a part of the general revenue of the state. * * * And the revenue arising from the taxation under the provision of this act, whether arising from a license fee or a license tax, is for the improvement of roads; and these roads are for the use, convenience, pleasure, and profit of automobile owners, and in large part will be for the benefit of the inhabitants of cities engaged in commerce and trade, to whom those owning or driving automobiles over the country roads shall come to bring their wares and products and to make purchases of the articles needed in their homes."

A classification of motor vehicles, operating as common car-

riers on the state highways, for the purpose of raising highway funds according to the distance traveled, will be sustained, for as the court said in the case of *Clark v. Maxwell*, 197 N. Car. 604, 150 S. E. 190: "Upon this principle, the classification made by the general assembly of this state for purposes of taxation of persons, firms, or corporations engaged in the business of operating motor-propelled vehicles, for the transportation of property on the public highways of the state, for compensation, must be sustained. All persons, firms, or corporations engaged in such business are required to pay a license tax. None are exempt. The amount of the tax is determined by the class in which each person, firm, or corporation is included. The distinction between those who transport property over the public highways of the state, for compensation, between termini which are less than fifty miles distant from each other (subsection 2, section 165, chapter 345, Public Laws 1929), and those who transport property over said highways also for compensation sometimes between termini which are less, and sometimes between termini which are more, than fifty miles distant from each other, dependent upon the contract with each customer (subsection 3, section 165, chapter 345, Public Laws 1929), is, we think, reasonable and not arbitrary. The privilege of engaging in the latter business is more valuable than the privilege of engaging in the former business only. The service furnished by the state to the former is less expensive than the service furnished to the latter. It can not be said that it is unjust for the state to require a large license tax to be paid by the licensee who acquires by his license the more valuable privilege, at a greater cost to the state. We can not hold as a matter of law that the classification made in this instance by the general assembly is void, or that the line separating the two classes is arbitrary."

That motor vehicles which are used exclusively for hauling farm produce, livestock and fertilizers may be exempt from the payment of a motor vehicle tax levied for the purpose of providing highway funds is sustained in the case of *Southern Transfer Co. v. Harrison*, 171 Ga. 358, 155 S. E. 338, where the court said: "The legislature can make any classification or subclassification which is reasonable and not arbitrary. It is within the power of the general assembly to make one general class of persons engaged in a particular business, for the purpose of taxing their occupation; and it may constitutionally make for this purpose a more limited class composed of persons engaged in the same occupation in a particular way. The fact of the exemption of certain persons from the operation of the tax imposed upon a

class does not destroy the uniformity required by the * * * provision of the constitution, provided the exemption is not arbitrary and is based upon some good reason. * * * The exemption of persons and corporations engaged exclusively in hauling farm produce, livestock, and fertilizers is not unreasonable or arbitrary."

Whether a motor vehicle operating for hire is a common carrier and subject to be regulated as such is a question of fact; and where such service has been rendered regularly for a number of years, the concern is subject to such regulations, for as the court said in the case of Claypool v. Lightning Delivery Co. (Ariz.), 299 Pac. 126, P. U. R. 1931D, 396: "So in this, as in any other similar case, it is the general conduct of the actual business, and not isolated acts or statements, public or private, which fix the character of a common carrier on a party. And no form of subterfuge or evasion will prevent the courts from going behind the form to the substance. The Lightning Delivery Company advertised for years in the daily papers and by posters. Samples of the nature of this advertising may be quoted as follows: 'A commercial trucking service that has proved successful for thirty-two years in Arizona.' * * * We are of the opinion that the evidence establishes beyond contradiction that each of plaintiffs held itself out as engaged in the business of carrying goods for others as a public employment, and not as a casual occupation; that it undertook to carry goods of substantially any class, in accordance with its general character and business, and that such transportation was for hire. These facts constitute them all common carriers. * * * We therefore hold that plaintiffs are not merely common carriers, but are carriers of a character subject to the tax. * * * We have never heard it urged before that the granting of compensatory privileges was a prerequisite to the right of a state to impose an excise or tax. The only limitation upon the taxing power of the state is that all persons or property in the same class must be taxed alike, and that the classification must be reasonable in its nature. * * * Since, we have held, each of plaintiffs was a common carrier as to at least part of its business, and a carrier of the nature subject to taxation under section 1680, supra, and since such section is constitutional, the trial court erred in rendering judgment in their favor."

While the state may regulate motor vehicles operating as common carriers on its highways by requiring that they secure a certificate of convenience and necessity from its railroad commission, it may not require a private carrier to become a public

carrier in order to secure the privilege of carrying on its business over the public highways. In enunciating this principle and discussing its application, the Supreme Court of the United States, in reversing the Supreme Court of California, spoke in part as follows in the case of *Frost v. Railroad Commission of California*, 271 U. S. 583, 70 L. ed. 1101, 46 Sup. Ct. 605, P. U. R. 1926D, 483: "Plaintiffs in error were engaged under a single private contract in transporting, for stipulated compensation, citrus fruit over the public highways between fixed termini. They were brought before the commission charged with violating the act, for the reason that they had not secured from the commission a certificate of public convenience and necessity. The commission, while agreeing that plaintiffs in error were, in fact, private carriers, held that they were subject to the provisions of the act and directed them to suspend their operations under their contract unless and until they should secure a certificate that public convenience and necessity required the resumption or continuance thereof. The commission's order was upheld by the state Supreme Court. 197 Cal. 230, 240 Pac. 26. * * * It is very clear that the act, as thus applied, is in no real sense a regulation of the use of the public highways. It is a regulation of the business of those who are engaged in using them. Its primary purpose evidently is to protect the business of those who are common carriers in fact by controlling competitive conditions. Protection or conservation of the highways is not involved. This, in effect, is the view of the court below plainly expressed. 197 Cal. 230, 240 Pac. 26. Thus, it will be seen that, under the act as construed by the state court, whose construction is binding upon us, a private carrier may avail himself of the use of the highways only upon condition that he dedicate his property to the business of public transportation and subject himself to all the duties and burdens imposed by the act upon common carriers. In other words, the case presented is not that of a private carrier who, in order to have the privilege of using the highways, is required merely to secure a certificate of public convenience and become subject to regulations appropriate to that kind of a carrier; but it is that of a private carrier who, in order to enjoy the use of the highways, must submit to the condition of becoming a common carrier and of being regulated as such by the railroad commission. * * * That, consistently with the due process clause of the Fourteenth Amendment, a private carrier can not be converted against his will into a common carrier by mere legislative command, is a rule not open to doubt and is not brought into question here. * * * The naked question which we have to deter-

mine, therefore, is whether the state may bring about the same result by imposing the unconstitutional requirement as a condition precedent to the enjoyment of a privilege, which, without so deciding, we shall assume to be within the power of the state altogether to withhold if it sees fit to do so. Upon the answer to this question, the constitutionality of the statute now under review will depend. There is involved in the inquiry not a single power, but two distinct powers. One of these—the power to prohibit the use of the public highways in proper cases—the state possesses; and the other—the power to compel a private carrier to assume against his will the duties and burdens of a common carrier—the state does not possess. It is clear that any attempt to exert the latter, separately and substantively, must fall before the paramount authority of the constitution. * * * It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence. The prior decisions of this court amply justify this conclusion.

* * * We hold that the act under review, as applied by the court below, violates the rights of plaintiffs in error as guarantied by the due process clause of the Fourteenth Amendment; and that the privilege of using the public highways of California in the performance of their contract is not and can not be affected by the unconstitutional condition imposed. *Western U. Teleg. Co. v. Kansas*, supra, p. 48 (54 L. ed. 374, 30 Sup. Ct. 190)."

§ 728. **Public utility commissions the logical regulating agency.**—In a few states, notably Kentucky and West Virginia the state highway commission is charged with the duty of regulating motor vehicles operating for hire as common carriers; but the more common and it would seem the more logical and practical system of state control is by the public utilities commissions. This is the special agency created expressly for the sole purpose of regulating and controlling public utilities and, as this commission has jurisdiction over utilities generally, including all other forms of common carriers, this state agency is the one best fitted to regulate motor vehicles. And as an im-

portant branch of transportation it should be under the jurisdiction of the same regulatory authority as other systems of transportation in order to secure uniformity and a comprehensive system or plan for serving the public as common carriers.

Under the power of the state to regulate traffic upon its highways and to raise funds with which to build and maintain them, a fee may be required of motor vehicles operating as private carriers on the highways in exchange for the privilege of doing so, for as the court said in the case of *Savage v. Commonwealth*, 152 Va. 992, 147 S. E. 262: "There seems to be no doubt whatever as to the power of the state to regulate traffic upon the highways, even to the extent of prohibiting the use of such highways as the chief situs for the conduct of private business, subject always to constitutional rights. The Virginia act, as its main purpose, is designed to produce revenue for the construction and repair of highways by placing appropriate financial burdens upon those who use them as the chief place for conducting private business. Another principle is involved. No legislative act should be construed as intended to deny constitutional rights unless such a conclusion is unavoidable. The general assembly is presumed to know that it could not legally violate the constitutions of the United States by requiring private carriers of freight to become common carriers against their will, and, as we understand this act, it does not purport to do so, but carries the fundamental distinction between public and private carriers upon its face and undertakes to impose no illegal burden upon a private carrier. The petitioner here was engaged in the business of transporting property upon the public highway as a private carrier. For that privilege he was required to secure a certificate E, and to pay the fee therefor imposed by the statute. This was a legal exaction, and therefore the judgment is affirmed."

§ 729. **Proper sphere of highway commissions.**—State highway commissions are established and should be operated exclusively for the very important purpose of improving and maintaining our highways in the best possible manner and at the least expense. The road building plans of these commissions are very extensive and contemplate the expenditure of many millions of dollars annually, which, with the necessary maintenance work, provides an exceptionally heavy program of work. They are fully occupied with these lines of activities and their attention should not be diverted from so difficult and exacting an undertaking by problems of transportation, which in themselves constitute one of our largest and most important fields of social, eco-

nomic and civil activity. In fact these two commissions have little or nothing in common as originally designed and their lines of duty diverge completely—each demanding the best efforts and undivided attention of their personnel.

§ 730. **Concentration of commission control.**—Even if the highway commissions were organized and equipped to handle transportation or any other public utility problems it is earnestly submitted that, within any single state, the matter of regulating common carriers or any special utility should all be concentrated in one commission. Division of such control between two or more state commissions would destroy any regularity of operating conditions, and bring chaos and confusion bordering on the conditions resulting from free and open competition between these natural monopolies.

Regulation by the state of motor vehicles operating as private or common carriers on the state highways is permitted and the policy of doing so is discussed as follows in the case of *Georgia Public Service Comm. v. Saye &c. Transfer Co.*, 170 Ga. 873, 154 S. E. 439: "Numerous courts have decided that where the use of the highways is by one who conducts a business which affects the public interest, such business is subject to regulation by the state. The state has a proprietary right in and to its highways, and therefore has the power to prohibit or regulate and control the use of its highways for purposes of private gain. * * * We have said that the statute does not change the status of the appellant as a private carrier at common law in so far as its relations to the general public are concerned, because the test generally recognized for distinguishing a private from a common carrier is that a common carrier is obliged, within the limits of its ability, to serve all who apply, while a private carrier is under no such obligation. * * * Where the public interest is affected by a carrier's use of the public highways it is immaterial whether the carrier itself be public or private. * * * We think the act provides for the regulation of this company even as a private carrier. * * * So far as we are aware, the Supreme Court of the United States has never held that, where the transportation business of a carrier was affected with a public interest, it was not within the power to regulate it in the use of the state's own highways."

Where the statutes provide for the payment of a tax by motor vehicles operating under certificates of public convenience and necessity as common carriers between fixed termini, motor vehicles, which are not required to obtain certificates of public con-

venience and necessity and do not operate over fixed routes, are not liable for the payment of such a tax, for as the court said in the case of *McIntyre v. Harrison*, 172 Ga. 65, 157 S. E. 499, P. U. R. 1931C, 401: "Applying this principle in the construction of the * * * provision of this act, it seems to be clear that the plaintiffs are not liable to this tax. In the first place, this tax is to be collected by the comptroller general from 'every auto transportation company association, or individual, * * * to which has been granted a certificate of public convenience and necessity.' None of these plaintiffs have been granted certificates of public convenience and necessity. Under the express terms of this statute this tax can only be collected from those to whom such certificate has been granted. In the second place, this tax can be collected only from auto transportation companies, associations, or individuals engaged in the transportation of passengers or freight, or both, between fixed termini. Statutes levying taxes on the inhabitants of this state will not be extended by implication. The plaintiffs were not engaged in transporting passengers or freight between fixed termini. These things being so, the plaintiffs are not liable to this tax. *State v. McLemore*, 155 Tenn. 59, 290 S. W. 386. * * * But other provisions of this statute lead us to the conclusion that it was not intended to embrace private carriers, and that its operation must be confined to common carriers alone. * * * If the service to be rendered is a private and not a public service, no such certificate should be granted. A private carrier renders no public service, but private service. * * * A private carrier engaged in transportation by motor vehicle for certain persons or concerns, under contracts with them, is not subject to such requirement. The object and purpose of granting certificates of public convenience and necessity for the operation of motor bus lines is to subserve the convenience and necessity of the traveling public. * * * So we are of the opinion that the Motor-Carrier Act of 1929 was not intended to confer on the public service commission the power to control and regulate the business of private carriers who are engaged in the transportation of goods or passengers by means of motor vehicles. * * * It is urged that the act with which we are dealing undertakes to regulate the use of the public highways; and that the legislature can do this without violating the due process clauses of the federal or state Constitutions. The trouble with this contention is that this act is not one intended to regulate the use of the public highways by motor vehicles. On the contrary, its caption ex-

pressly declares that it is intended 'to regulate the business of transporting for hire persons and property by motor vehicles on the public highways of the state.' * * * If this act were made applicable to private carriers, it would amount to the exercise of the power to regulate the use of the public highways, so as, in effect, to compel private carriers to become public carriers. This the legislature can not do. * * * A 'private carrier' is one who, without being engaged in the business of carrying as a public employment, undertakes to deliver goods in a particular case for hire or reward. He may carry or not as he deems best. He is but a private individual, and is invested, like other private persons, with the right to make his own contracts."

Statutes providing for the payment of a license tax and a registration fee before motor vehicles may operate for hire upon the public highways will be sustained as a proper regulation under the police power, and do not constitute double taxation where the amounts paid into the highway fund are reasonable, for as the court said in the case of *Inter-City Coach Lines v. Harrison*, 172 Ga. 390, 157 S. E. 673: "There is such distinction between license fees, or license taxes and occupation taxes, and other ordinary taxes. * * * This court held that such dealer, by reason of the payment of his license tax, was not exempt from the special tax. * * * The fee or tax imposed by the Motor-Carrier Act for the grant of public convenience and necessity is in no sense an occupation tax. The obtaining of such certificate and the payment of a fee or tax therefor is only one step which is necessary to be taken in order to obtain a license to engage in the business of transporting passengers or freight or both by motor buses upon the public highways of this state between fixed termini. The other fee or charge for the registration of each bus engaged in such business and for a license to operate each bus is essentially a license tax, and is so denominated in the act itself. * * * Both of these fees or taxes are paid as conditions precedent to the grant of a license authorizing these motor carriers to engage in the business of transporting passengers or freight or both upon the highways of this state. The imposition of these fees or taxes is a regulation under the police power, which must be complied with as conditions precedent to engage in this occupation. * * * The purpose of the imposition of these fees or taxes is to furnish the funds by which the Motor-Carrier Act may be enforced, and to provide for the use of any surplus of these funds in repairing the highways of this state. So we are of the opinion that they are not imposed

as occupation taxes upon motor carriers engaged in this business. They are imposed as conditions precedent with which such carriers must comply before they can obtain license to engage in such business. The taxes imposed by these two acts do not constitute double taxation. * * * The 'municipality of "Atlanta,"' created by the act of August 17, 1929, is not a city or town in the ordinary sense of cities or towns in this state, and as used in the above provision of the Motor-Carrier Act of 1929. * * * This being so, the provision of the Motor-Carrier Act with which we are dealing does not exempt the operators of buses within this territory from the taxes imposed by the Motor-Carrier Act, or from the occupation tax imposed by the above amendment to the General Tax Act of 1927; does not exempt them from the supervision of the public service commission; and does not relieve them, when operating as common carriers, from procuring from that body certificates of public convenience and necessity."

§ 731. Purpose of regulation.⁴—The very purpose of regulation by state agencies is to secure uniformity of operating conditions among similar utilities and to save the economic waste that follows unregulated and useless duplication of service, which destroys itself and fails to furnish permanent satisfactory service at fair rates, cripples the existing necessary systems, commits waste, and impairs the public service.

Before issuing a certificate of convenience and necessity, the public service commission must take into consideration the service which is being furnished, determine the likelihood that the proposed new service will be permanent and continuous, and also consider its effect upon other services, all with a view of securing adequate service under uniform operating conditions if possible, and further to avoid useless duplication of service which is wasteful and frequently unsatisfactory and expensive. This principle is established and clearly discussed as follows in the case of *State v. Public Service Comm.*, 324 Mo. 270, 23 S. W. (2d) 115: "It is true that all orders of the commission are subject to judicial review, and that suits brought for such review must be 'tried and determined as suits in equity.' But, after the chancellor has made his own finding of the facts, the only application he can make of them is to determine from them whether the order under review is reasonable and lawful. If he finds it both reason-

⁴This section of third edition cited in *State v. Public Utilities Comm.*, 327 Mo. 249, 37 S. W. (2d) 576, and

State v. Public Utilities Comm., 324 Mo. 270, 23 S. W. (2d) 115.

able and lawful it is his duty to affirm it; if he finds it either unreasonable or unlawful, he must set it aside. He can not modify it or entirely displace it with one of his own, as was done by the circuit court in this case. * * * 'In determining whether or not a certificate of convenience and necessity should be issued, the commission shall give reasonable consideration to the transportation service being furnished by any railroad, street railway or motor carrier, and shall give due consideration to the likelihood of the proposed service being permanent and continuous throughout twelve months of the year and the effect which such proposed transportation service may have upon other forms of transportation service.' The act further provides that no vested right shall accrue to any certificate of convenience and necessity, but that the same may be revoked after notice and hearing, if the commission finds that the carrier operating under it does not give convenient, efficient, and sufficient service. * * * The statute in this respect is in complete harmony with the general principles which obtain as to state regulation of public utilities. 'The very purpose of regulation by state agencies is to secure uniformity of operating conditions among similar utilities and to save the economic waste that follows unregulated and useless duplication of service, which destroys itself and fails to furnish permanent satisfactory service at fair rates and cripples the existing necessary systems, commits waste and impairs the public service.' Pond on Public Utilities (third edition), section 731, p. 778. The order in question is one clearly falling within the discretionary power of the commission; it is expressly based on the first consideration mentioned in the statute; under the evidence, it could equally well have been placed upon both the first and third. As already forecast, we find the order under review both reasonable and lawful."

This same court in a later case sustained the action of the public utilities commission in refusing to issue certificates for motor vehicle service to existing railroads, because this would destroy or seriously disable the present motor vehicle service which was already adequate, and would create a duplicated competitive service which is wasteful and generally unsatisfactory, and therefore, undesirable. This principle is again stated and clearly discussed as follows in *State v. Public Service Comm.*, 327 Mo. 249, 37 S. W. (2d) 576, 75 A. L. R. 232, P. U. R. 1931D, 199: "Here we have duly certificated motor carriers already in the field, furnishing adequate and satisfactory service, willing and able to furnish any additional facilities and service which may

be needed or which the commission may order. They began, under certificates from the commission, when the highway was not so good and the demand for bus service less, and they have built up their transportation systems to a high state of efficiency, serving, and evidently capable of continuing permanently to serve, the public adequately. Applicant transportation company now seeks to enter the field in competition with the existing motor carriers, because, while applicants, disclaim a desire to compete for business now done by the certificated carriers, there can be no doubt that there would be such competition. If granted a certificate, the transportation company would inevitably take an appreciable amount of such business, enough, we are satisfied, to reduce the profits of the present motor carriers to the vanishing point. The transportation company, while it has little or no expectation of making a profit out of the motor carrier business if granted a certificate, would, of course, endeavor to do so. It is willing to operate without profit if no profit can be made, in order to save to the railroad company the cost of operating the trains. The present carriers can not do that. Either rates would have to be raised to compensate for the loss of their passengers or these carriers would be forced to quit. Should the certificate applied for be granted, then, in order that all certificated carriers operating over the route might make a reasonable profit, rates would inevitably have to be raised.

* * * Useless duplication of service tends to destroy itself, to cripple existing systems, commit waste, and impair the public service, and fails to furnish permanent satisfactory service at fair rates. See Pond on Public Utilities (third edition), section 731, p. 778. * * * So far as the applicant Missouri Pacific Transportation Company is concerned, there can be no doubt that, upon the facts shown, the order of the commission refusing it a certificate was not unreasonable or unlawful. Neither do we think it was unreasonable or unlawful as to applicant Missouri Pacific Railroad Company. * * * It would, as above-pointed out, result in increased competition with established motor bus service which the business and public necessity do not justify, and would inevitably prove detrimental to, and probably destructive of, the now established motor carrier agencies, to the ultimate detriment, we think, of the public convenience and interests. Should the railroad company desire only to discontinue the trains since they can not be operated without loss, that is a matter to be presented to the commission."

§ 732. **Permits of public convenience and necessity.**—The policy of state regulation of motor vehicles, operating as common carriers, is legislative and administrative, and having determined on the agency of the state for such purpose, it then becomes the duty of the state to define the operating conditions for this new form of transportation. The general trend of statutory regulation on the subject provides for the issuing of permits of public convenience and necessity through the public utilities commissions. These permits may issue as a matter of course and fairness to such motor systems of conveyance as were operating in good faith when the statutory legislation is enacted, and if such is the policy decided upon by any particular state, it should be expressly enacted in the statute.

Under the power of the state to regulate motor vehicles operating as common carriers on the public highways for hire, a private carrier who does not hold himself out as ready to serve the public generally and does not solicit or accept such business is not a common carrier or subject to be taxed or regulated as such. This principle with a clear discussion of the distinction between private and common carriers is furnished as follows in the case of *Jones v. Ferguson* (Ark.), 27 S. W. (2d) 96: "The only question for our consideration is whether Jones was a public carrier or a private carrier. The law recognizes two classes of carriers, viz.: private carriers and common carriers. All persons who undertake for hire to carry the goods for another belong to one or the other of these classes. A private carrier is not bound to carry for any reason, unless it enters into a special agreement to do so. A common carrier is bound to carry for all who offer such goods as it is accustomed to carry and tender reasonable compensation for carrying them. 4 R. C. L. 549. A common carrier is one that holds itself out as ready to engage in the transportation of goods for hire as a public employment and not as a casual occupation. 10 C. J. 41. A common carrier is not only one who holds itself out as engaged in the business for the public, but it is required to carry for all who offer their goods. It is a public service and is therefore subject to regulation; a private carrier is not. A private carrier does not hold itself out as engaged in the business for the public and is therefore not subject to regulation as a common carrier. * * * The undisputed evidence in the instant case shows that appellant did not hold himself out to the public as ready to undertake for hire the transportation of goods or passengers. His general business is not with the public; he does not solicit customers from the gen-

eral public, and, therefore, under the case just cited, he does not come within the regulatory provisions of the statutes. Appellee, in discussing the case of Michigan Public Utilities Commission v. Duke, 266 U. S. 570, 45 Sup. Ct. 191, 193, 69 L. ed. 445, 36 A. L. R. 1105, said: 'It is held by the Supreme Court in that case, that it is beyond the power of the state by legislative fiat to convert property used exclusively in the business of a private carrier into a public carrier,' and concedes that the soundness of this position can not be questioned, but appellee says that the carrier in the case referred to had contracts with only three shippers. That is true he had contracts with but three persons, but he employed seventy-five men and operated forty-seven motortrucks and trailers upon the public highways of Michigan, which formed part of the route between Detroit and Toledo. In the instant case appellant has but one truck, and although in the Duke case, above referred to there were only three contracts, yet it appears that the business done by this carrier was many times greater than the business done by appellant. The Michigan act is substantially the same as our act. It provides that no person should engage or continue in the business of transporting persons or property by motor vehicle for hire upon the public highways of the state over fixed routes or between fixed termini, unless he shall have obtained from the Michigan public utilities commission a permit so to do. * * * The act of the legislature involved is valid, but it has no application to private carriers. Since the appellant in this case does not solicit business from the public, does not hold himself out as ready to serve the public, and refuses to accept freight, as the undisputed evidence shows, from the public, he is not a common carrier but a private carrier."

Where a certificate of convenience and necessity was issued by the public utilities commission under a section of the statute providing that such certificates should be issued to parties according to the condition of their operations and the extent of the service and equipment at the time of the passage of the statute, such a certificate gave no right for an increased or extended service, as is indicated in the case of Cincinnati Traction Co. v. Public Utilities Comm., 113 Ohio St. 668, 150 N. E. 308, P. U. R. 1926C, 315, where the court said: "The plain intent of this section was to confirm the operator in the right which he was exercising upon April 28, 1923, and in no greater right. If this were not so, the operator by unlimited increase of motor service could set at naught the powers of the commission to define the amount

of service upon his particular route. This holding is in line with a leading decision from California, in which the motorbus law is similar to ours. Thus the case of *Motor Transit Co. v. Railroad Commission of California*, 189 Cal. 573, 200 Pac. 586, construes a statute practically the same as the Ohio law upon the point involved in this case. The Supreme Court of California in that decision held that the commission was right in determining that only such service as was in actual operation prior to the date corresponding to April 28, 1923, in the California Statute could be continued without the formal application required in the statute. The commission, therefore, was in error in dismissing the first complaint. * * * Noncompliance with a mandatory statute might well constitute good ground for revocation. However, the commission is invested with discretion in deciding upon the facts whether or not good cause for revocation has been shown, and we do not consider that its decision upon this point constitutes an abuse of that discretion."

While certificates of public convenience and necessity are made available by the statutes of a number of the states to motor vehicles which were operating for hire on the public highways when these statutes were enacted, such concerns must avail themselves of this privilege, provided by the statute, within a reasonable time, which time may be fixed by the rules and regulations of the commission. As the purpose of this provision, along with the statute generally, is to regulate and limit the number of motor vehicles operating as common carriers to those necessary for the public convenience, an application under this provision, which is not made within a reasonable time, may be denied, for as the court indicated in *Re Edwards*, 100 Fla. 989, 130 So. 615: "Furthermore, the commission found that he had failed to attempt to exercise such right 'within a reasonable time' as required by the rules of the railroad commission. It is true, the act provides that a certificate shall be granted as a matter of right to such auto transportation companies as were operating in good faith on the nineteenth of April, 1929, over the route for which such certificate shall be sought, but necessarily this was a right or privilege which the statute, considering all of its provisions together, contemplated should not be indefinitely or permanently extended, but that it should be exercised within a reasonable time, and the commission was expressly vested by the act with the power to prescribe rules and regulations in the exercise of the jurisdiction thereby conferred upon it. See section 5 of chapter 13700. What rules or regulations the commission

have adopted in respect to this particular matter are not shown by the petition. It is evident that one of the prime purposes of this act was to confine the number of auto transportation companies operating over a given route to such number as the public necessity and convenience should really require."

What constitutes a reasonable time, when this is not expressly fixed by the statute, within which application may be made by motor vehicles to operate as common carriers on the ground that they were so operating when the statute was passed, may be determined by the commission, whose discretion will generally be respected by the courts, as is indicated in the case of *Leonard Truck Lines, Inc. v. Louisiana Public Service Comm.*, 171 La. 402, 131 So. 188, where the court said: "There is no precedent on which to decide the case. The public service commission and the district court based their ruling upon the fact that the legislature had not fixed a time limit in which a motor carrier operating in good faith when the statute went into effect should file the affidavit provided for in the third paragraph of section 3 of the act, and concluded that the commission had no authority to fix any such time limit. Assuming, for the sake of argument, that the commission has the authority to fix a time limit in which motor carriers who were operating when the statute went into effect shall avail themselves of the privilege granted by the third paragraph of section 3 of the act, it is certain that the statute does not in terms fix any such time limit, or compel the public service commission to fix one. In a doubtful case, such as this, and with no precedent for our guidance, we defer largely to the judgment of the public service commission, the tribunal especially invested with the authority and duty of administering and applying the provisions of the statute. No injustice is done to the appellant by the ruling complained of."

§ 733. **Issuing permits by state.**—On the other hand if the state decides that the matter should be left open to be determined on the merits of each particular case as it arises, the commission should be given discretion in deciding the matter, as they must, in all new cases arising for their decision. Just when and under what circumstances motor vehicle lines should be permitted to enter a field is a business problem, and it should be decided by a competent, impartial body, acting for the state, with the question of the public service always in the foreground, and with a view to future as well as present conditions.

Under a statute providing for certificates for common carriers between fixed termini or over regular routes, motor vehicles

transporting children to and from school may properly be excepted, because they are not common carriers within the meaning of the statute, as may also be companies transporting farm products to the market and carriers of freight operating between or within contiguous municipalities, and taxicabs and hotel buses which are local in their operation. This principle is established and discussed as follows in the case of *State v. Le Febvre*, 174 Minn. 248, 219 N. W. 167: "The state has control of the public highways and may regulate and on occasion even prohibit transportation by common carriers thereon. * * * The statute was enacted to meet new conditions brought about by the entry of motor vehicles into the business of transporting passengers and freight over the state highways as common carriers. It has in view, directly or indirectly, public safety and convenience; but principally its purpose is the control and regulation of common carriers by motor vehicles and a possible resultant prohibition of competition. Transportation companies are forbidden to operate except upon compliance with the act. * * * The legislature may not by its declaration make a carrier for hire a common carrier and so compel it to devote its property to a public use. * * * Doing so constitutes a taking of private property for public use without compensation and violates the Fourteenth Amendment. The Minnesota statute does not attempt such a thing. It applies only to common carriers 'between fixed termini or over a regular route.' It does not make a carrier for hire a common carrier subject to its provisions. * * * The exception of carriers engaged exclusively in the transportation of children to or from school is not unreasonable nor arbitrary. School buses are not common carriers within the meaning of the statute. They convey children in certain localities to certain schools and are operated by the districts or under contract with them. A similar contention was ruled against the claim of the defendant in *Smallwood v. Jeter*, 42 Idaho 169, 244 Pac. 149. The exemption of transportation companies engaged exclusively in transporting agricultural, horticultural, dairy or other farm products from the point of production to the primary market, and motor vehicles used exclusively in transporting or delivering dairy products is not unreasonable nor arbitrary. * * * The exemption of intracity freight carriers and carriers of freight between contiguous municipalities is not arbitrary or unreasonable. The delivery of freight within municipalities or between contiguous municipalities is so different from the carrying of freight between different termini on a fixed route, on a fixed

schedule, and on a specified tariff, as to indicate a sufficient reason for the exemption. See *Schultz v. Duluth*, 163 Minn. 65, 203 N. W. 449. There is such a difference that the legislature may base a classification upon it. The exception of those engaged in operating taxicabs is not unreasonable nor arbitrary nor fanciful. The difference between the operation of taxicabs and motor vehicles operating between fixed termini over a regular route is apparent. * * * The exemption of hotel buses suggests no unfair discrimination. Usually their regulation, if any, is local."

§ 734. **Michigan practice ignores existing systems.**—In Michigan the special statute, enacted in 1923, sections 11342-11352, Compiled Laws, giving the public utilities commission jurisdiction over motor vehicles, transporting persons and property for hire, fails to define the attitude of the state on the policy of issuing permits for their operation. The commission was sustained by the court, however, in their decision that when public convenience and necessity justified the issuance of such a permit it should issue without considering existing transportation facilities. (*Rapid R. Co. v. Michigan Public Utilities Comm.*, 225 Mich. 425, 96 N. W. 518.) This commission was sustained by the court in the position that, this being an age of evolution in the transportation business, when steam railroads greatly reduced the earnings of vessels and put the stage coach out of business, and when electric cars greatly affected certain business of steam roads, the use of motor vehicles will naturally decrease very materially the earnings of electric roads, and, if it is desirable to give the commission power to prevent competition between motor and steam and electric lines by refusing permits to such lines to operate where the public is already served adequately, the legislature should so provide by statute.

After being denied a certificate to transport property for hire by motor vehicles, because a certificate for this service had been issued to another, the party will not be permitted to continue to render the service as though such a certificate had been issued for it by securing special contracts with his regular patrons and rendering similar service for other customers as "errands," because this would be a clear evasion of the purpose of the statute, which provides for the regulation of such service by common carriers, and the plan of special contracts and service as errands does not change the nature or character of the service. This principle is established and discussed as follows in the case of *Michigan Public Utilities Comm. v. Krol*, 245 Mich. 297, 222 N. W. 718, where the court said: "The commission is empowered

in the public interest 'to determine the number of persons, firms or corporations who should be permitted to so operate.' *Rapid R. Co. v. Michigan Public Utilities Commission*, 225 Mich. 425, 196 N. W. 518, *supra*. In granting a permit to the motor company the commission determined the necessity as a matter of public convenience for the operation by a common carrier of a service for transporting property by motor vehicle for hire between Sault Ste. Marie and Detour. And by its denial of a permit to defendant it also determined that but one such permit should be granted. In other words, it determined that the transportation business between these places did not warrant the granting of a permit to two persons to engage therein. * * * We can not be insensible to the fact that defendant is now doing substantially all of the carrying business between Sault Ste. Marie and Detour; that which the motor transport company may lawfully do under its permit. To all intents and purposes there has been no change in the nature of the business done by him after the last permit was refused, except that he sought to protect himself from a violation of the law by securing the contracts entered into from his regular patrons and performing other services which might be called 'errands' for customers. The law will not permit such an evasion of the intent and purpose of the statute. * * * The effects of defendant's operation are identical with those of common carriers. If he may, by entering into these contracts and conducting his business in the manner testified to by him, relieve himself from complying with the law requiring a permit and from being placed in the class of common carriers, it will furnish an easy way to escape liability. He was engaged in the same business now conducted by him at the time the law became effective. He recognized its application thereto, and twice applied for a permit thereunder. He should not be permitted to evade the requirement of the statute as he is now doing."

§ 735. **Colorado rule considers established service.**—In Colorado the public utilities commission in the absence of any directing statute on the question of issuing permits for motor vehicle transportation for hire, expressed its perplexity in deciding on its policy of issuing such permits where competitive conditions exist with steam or electric lines. (*In re Colorado Motor Way*, P. U. R. 1924A, 56.) While the commission considered such conditions and indicated its aversion to granting such new permits where the public was being properly served at the time, it also decided that an applicant for a permit to give such additional

service was not obliged to establish the question of convenience and necessity beyond a reasonable doubt. Such a requirement it said has never been made by any court or commission and would be absurd, adding that the railroads must understand that the state does not guaranty a return upon their utility investments, and expressing the belief that the automobile is here to stay and that its service can not be eliminated by legislatures, commissions, or courts. Being an industrial fact so well established in our transportation systems, it must be recognized and respected, for the law will not compel us to ride on a railroad train or forbid us the right to ride in an automobile if we desire. To attempt this would not be consistent with our American notion of human and individual liberty. A strong dissenting opinion points out the necessity of our railroads and of conserving their investment and income if their public service is to be continued and sustained.

§ 736. **Utah favors feeder system.**—In Utah the commission denied a permit to a motor vehicle line to operate a through service in partial competition with the street railway system and issued a permit whereby the street car lines would supplement its own service by motor buses, operating as feeders. This may be one of the best solutions of the question. This case involves a very delicate and vital point in local transportation problems, for in many cases the long distance haul under a uniform rate throughout the city is only made possible by virtue of the short haul, and where both are necessary to continue our well-established practice of uniform city fares for the purpose of encouraging the wide distribution of our urban population, the system which affords such service must be protected if the service is to be continued.

§ 737. **Indianapolis permits additional service for increasing business and as feeders.**—In a city like Indianapolis, for example, however, where the population is rapidly increasing and constantly demanding all the different and best forms of local transportation, independent motor buses and coaches were operated alongside and in direct competition with a similar service afforded by the street car system, operating its motor coaches as feeders. A similar condition existed between steam, electric and motor vehicles operating out of Indianapolis to other cities in Indiana and elsewhere. The independent motor lines competed directly with the buses operated by the electric lines as well as with the electric and steam cars themselves. Unless the volume of business is growing rapidly and will be sufficient to sustain

these various agencies of transportation, the better policy would be that of regulation of the fewer lines or systems already established and, in case other additional forms of service are necessary, to provide them by fewer agencies and styles of transportation in order to avoid duplicated service and the economic loss of unnecessary facilities which exceed the actual demands for service. While experience is the best test of what service is necessary and which form of transportation is preferable, these results can best be anticipated and needless investments saved by resorting to proper state regulation before such competitive conditions arise.

Since this was written for the last edition seven years ago, many of the lines of service have been consolidated and in the city of Indianapolis itself, the local street railway company has acquired the independent motor buses at an expense of about half a million dollars, and in this way and at this cost consolidated service is now available. While this is the preferable form of service, the cost could have been saved largely by the street railway company having originally instituted this service. This furnishes another striking illustration of the advantages of consolidated forms of service being provided by the existing company from the beginning.

§ 738. California protects exclusive service where adequate.—The California public utilities commission very early in its history defined the policy which it has followed consistently ever since of issuing its certificates of public convenience and necessity in competitive territory. This policy provides that any public utility desiring to be protected by the commission from competition should not wait until such competition arises before rendering adequate and satisfactory service. This so far as possible should always be provided. The policy of this commission in protecting carriers from competition and conserving their income and investment covers competing motor vehicle lines among themselves and such lines which are operating along with other forms of transportation. Providing proper and satisfactory service, sustained throughout the years, including the more modern facilities of motor buses and trucks, and even airships where feasible, is the duty and best policy of any transportation system, desiring to be kept free from competition and to operate undisturbed under the control and protection of the state. Sufficient and satisfactory service is the price of exclusive fields.

§ 739. Complete service necessary for monopoly system.—The reasonable demands of public service must be met and the

rigor of the law of supply and demand recognized if any common carrier desires to enjoy the security of monopoly of service. If unable or for any reason it fails to furnish the most desirable modern facilities available, the existing system will meet competition in the public demand that such service be furnished by another agency. Whether the case proves to be one of the elimination of water transportation by the more rapid service of the railroad or the like case of the electric light extinguishing the candle or kerosene lamp, the demands of progress and invention are inexorable. While the motor vehicle bids for public support against the steam and electric lines it may finally be surpassed by the airship. In no case, however, will any system of transportation suddenly or completely wipe out all the others. Diversity of forms of service is demanded by different tastes and varying situations and each form alone or in connection with others may perhaps best serve in certain cases and meet the demands of special conditions.

An order of the state commission granting a certificate for service in new territory to the party first applying for such certificate, who made proof of the public convenience and necessity for the service, will be sustained over the objections of others applying for such a certificate who had been operating in adjoining territory, for as the court said in *State v. Department of Public Works*, 165 Wash. 556, 6 Pac. (2d) 64: "Those cases or anything in the discussions in them do not reasonably justify the claim that the statute with reference to territory already served is applicable to the situation of the appellants in the present case. As already stated, the Sunset highway has been opened and in use a great many years, and that portion of it over the summit has never been employed heretofore for auto freight service by any certificate holder. The vast area on the west side of the mountains has never been connected with the vast area on the east side by any such service, and now that it is proposed to authorize a through service between Seattle and Tacoma, on the west side, and Yakima and Walla Walla, on the east side, thirty-five miles of the highway over the summit being wholly free from any authorized freight service, the subject must be considered, as it was by the department and the superior court, as not being covered by the statute concerning territory already served with relation to the certificates held by either of the appellants. * * * In this respect it is worthy of remembrance that the Preston-Larsen Motor Freight Company made its application a year or more before either of these ap-

pellants, and had already made proof of public convenience and necessity, and shown itself entitled to a certificate, to the substantial satisfaction of the department; which circumstance, while not of controlling importance, may be well taken into consideration in deciding the issue. * * * In our opinion, it can not be held that the department acted arbitrarily or capriciously in its selection in this case. Upon both subjects, territory served and choice of applicants, we may apply the saying in *Denman v. Department of Public Works*, 157 Wash. 447, 289 Pac. 34, 35, 291 Pac. 1115: "To all intents and purposes this was a new territory and a new service, and the department might properly exercise its discretion in selecting the applicant it considered best fitted to render the service."

Although the issuance of a certificate of convenience and necessity generally is exclusive so that a monopoly of the service is given, it is under the continuous regulation and control of the commission, and is therefore not objectionable under the constitutional provision prohibiting the creation of a monopoly because public utilities are natural monopolies, and there is no natural field for competition afforded in their operation; regulation takes the place of competition, as is indicated in the case of *State v. Inland Forwarding Corp.*, 164 Wash. 412, 2 Pac. (2d) 888, P. U. R. 1931E, 394: "The monopoly interdicted by the constitution is one whose activities are hostile and oppressive to the common welfare, rather than those which at all times are subject to the dominion, judgment, and immediate regulation by the state. * * * But we have already seen that the evil of that kind of monopoly, or any at all, has been provided against by the terms of the statute, fairly and reasonably interpreted, and to say that issuance of a certificate of convenience and necessity, or permit to do business on the state's highways that are always subject to its control, the business being at all times subject to regulation by the department as to service and fares, constitutes an irrevocable grant or privilege or franchise is in a large way inconsistent, and has not been attempted by the statute, in our opinion."

§ 740. **Illinois prefers best service for entire public.**—In Illinois the commission has refused to issue permits to motor vehicle lines where the particular districts are already served properly by electric or other motor lines, for, although such new system might have accommodated a few parties, it would have resulted in crippling the existing service for the public at large. The best service to the greatest number, which insures continued

accommodations for all, is preferred and protected by this policy. The theory of this commission is to provide the public with efficient service at reasonable rates by requiring an established carrier, fully occupying the field, to give adequate service and by protecting such utility from ruinous and needless competition. This method protects the public from paying the cost of operating competing systems and of providing a reasonable return on a double investment of capital. The policy followed by the commission is a general one, upon which all commission control rests, of regulating and requiring existing utilities to render proper service and of protecting them as natural monopolies in serving the public, which can be done at a more reasonable rate than would be possible if competing systems were permitted. Whether public convenience and necessity require the establishment of new transportation facilities is not properly determined by the number of individuals requesting it, for the entire public is concerned, and must be considered as distinguished from any number of individuals. Fares are not the only thing to be considered in such cases for the public is equally concerned in the enjoyment of complete service which promises to be continuous. Admitting a new system at a reduced fare, which would accommodate only a small portion of the public and require increased fares for the remainder, would not result in public convenience.

While the object of granting certificates of convenience and necessity for the operation of motor vehicles is for the purpose of serving the convenience and necessities of the public, the granting of a certificate to a new motorbus line, where the existing one is giving satisfactory service and is able to extend its lines, would be unreasonable and arbitrary, as is indicated in the case of *Bartonville Bus Line v. Eagle Motor Coach Line*, 326 Ill. 200, 157 N. E. 175, P. U. R. 1927E, 333, where the court said: "Where the evidence shows that an existing motorbus line has been rendering satisfactory service and is financially able to extend its lines so as to reach a more distant point on the same route, it has been held that it was unreasonable and arbitrary for the commerce commission to deny an application for such extension and grant a certificate of convenience and necessity to another line just organized to operate over the entire route, where it was conceded by all parties that there was not sufficient traffic over the route to justify the operation of two motorbus lines (*Superior Motorbus Co. v. Community Motorbus Co.*, 320 Ill. 175, 150 N. E. 668). The object and purpose of granting certificates of convenience and necessity for the operation of motor-

bus lines is to subserve the convenience and necessities of the traveling public."

The commerce commission has no power to revoke certificates and issue others for the same service while a case is pending in court to determine the equities and contract rights of the parties concerned, because the commission has no authority to decide these questions, and their decision by the court is necessary before the certificates could be properly issued, as is indicated in the case of *Midland Trail Bus Line Co. v. Staunton-Livingston Motor Transp. Co.*, 336 Ill. 616, 168 N. E. 634, P. U. R. 1930A, 131, where the court said: "The commerce commission has exclusive jurisdiction to issue or refuse to issue certificates of convenience and necessity, but does not have jurisdiction to adjudicate the contractual rights of the parties. In revoking the certificate issued to appellee, and in issuing a certificate to appellant, the commission necessarily heard evidence concerning the contractual relations and the dealings between the parties. The commission recognized the fact that, if it was necessary, in the decision of the case before the commission, to pass upon the equities between the parties, it would be right and proper for the commission to withhold its decision pending the final decree of the court. The finding then went on to recite that the certificate of May 7, 1925, was procured by fraud inspired by Falkenberg. This finding could only be based upon evidence relative to the contractual relations and the dealings between the parties. * * * The court acquired prior jurisdiction, the commerce commission has no authority to adjudicate these questions, and it was in error in revoking the certificate to appellee and in issuing a certificate to appellant prior to the determination of the case pending in the circuit court."

§ 741. **Conservation of investments and service.**—Where there is an existing motorbus line, which had been in operation for some time and had expended large sums in establishing its service, such a system should be preferred to another proposing to enter the territory, provided it is being already properly served by the system first established. And while mere priority in time as between systems proposing to serve a certain field should not in itself govern the granting of a certificate, it is an element to be considered. The object should always be that of securing the best service and of conserving the investment of an established system and of protecting the one found best qualified and willing to render the desired service permanently at the most satisfactory rate.

§ 742. **Principle of prohibition of needless competition established.**—This principle of preventing needless competition and of regulating local common carriers as natural monopolies was enunciated, if not established, over thirty years ago in the state of Connecticut by statute, which was sustained by the court in the case of *In re Shelton St. R. Co.*, 69 Conn. 626, 38 Atl. 362. In this case the court refused to find that public convenience and necessity required the extension of the local street railway system along the public highway to other towns, which would run parallel to an existing railroad system. In the course of its opinion the court defined the term “public necessity” as used in the statute, as that “urgent, immediate public need arising from existing conditions which, in the judgment of the legislature, justifies the disturbance of private rights that otherwise might be legally exempt from such interference.” In denying the street railway company the right so to extend its system the court found that under the terms of the statute the “public convenience and necessity” was not sufficient to justify or require the proposed street railway, especially in view of its effect on the existing railroad which had applied to the court, under the statute, for the protection of its business and investment, and because of the unsatisfactory financial condition and apparent lack of ability of the applicant to construct and operate the proposed system.

§ 743. **New York experiment.**—In New York, prior to 1915 and under the statute of 1913, a certificate of convenience and necessity from the public service commission was required before a motorbus line could be installed to operate over the state highways outside of cities. The amendment of 1915, however, removed this condition and under it the consent of the public service commission was not required. In the case of *Niagara Gorge R. Co. v. Gaiser*, 109 Misc. 38, 178 N. Y. S. 156, the court found that this amendment “subjected the suburban railways of the state to such competition, resulting in what is generally known by communities to be practical bankruptcy, and almost universal applications for increases in fares; and undoubtedly in recognition of this situation, and of the inequity of permitting competing bus lines to use, without license fee or public service regulation, the highways and streets for which in many instances the railroad companies have been required, by the terms of their franchises, and under the general railroad law, to pave, the law was restored in its general features to that of 1913.

* * * The legislature has clearly recognized the necessity of

vesting in the public service commission authority to pass upon the question as to the convenience and necessity for such competing lines and the power to control their operation." By virtue of the amendment of 1919 such certificate of convenience and necessity must now be obtained of the public service commission before operating motor vehicle lines as common carriers in the state of New York. This policy of regulation and control of stage coaches and motor vehicles is the outcome of some forty years of experience in the state, as the Fifth Avenue Transportation Company, Limited, was authorized, on the payment of certain license fees, to operate a line of stages or carriages on certain streets of New York City by chapter 536 of the New York laws of 1886. This long experience and the disaster that attended the removal from 1915 to 1919 of the restrictions on the operation of motor vehicles for hire in this state furnishes valuable experience and a very compelling argument for the proper regulation and control of this extensive means of transportation in connection with other systems.

§ 744. **Unregulated service.**—In the absence of statutory regulation of the common carrier service rendered by motor vehicles, just as in the case of a failure to provide for the regulation of rates of public utilities, generally, such utility is free to operate without any such restriction or regulation. The failure of the states to regulate in such cases, however, results in great confusion and much inefficiency from extravagant, duplicated, and unnecessary service, in the consequent loss of investments, and ultimately in the failure to secure efficient permanent service for the public needs. Unless this situation is promptly met by the states, federal legislation must follow as a matter of necessity in order to secure anything approaching uniformity of service and rates and to protect present investments in our transportation systems, so far at least as matters of interstate commerce are concerned.

The necessity of state regulation and control of motor vehicles operating as common carriers in the streets and highways of the state is now generally recognized, and this plan of regulation has been universally adopted, as a matter of public safety and as the best method of securing adequate service at the most reasonable rates available. An excellent discussion of the questions involved and a clear statement of the legal principles controlling them is furnished in the case of *Stephenson v. Binford*, 53 Fed. (2d) 509, where the court said: "The power of the state to regulate and control the movements of motor vehicles over

its highways in the interest of public convenience and safety, and for the protection of the highways, for the proper use of which it is the trustee to the public, is of the widest scope, and provisions of this kind have been uniformly sustained. * * * That this system of regulation designed in the interest of the public convenience will operate to bring highway order out of highway chaos by preventing a further disintegration of the all but practically destroyed common carrier service on the roads. That the exercise of the powers which the act confers will not only protect the roadways and the people on them from the results of reckless and careless operation, but will give to the whole people of the state a safe and dependable system of transportation for the carriage of their freight by highway. * * * These problems have been attacked in most, if not all, of the states by statutes which, differing in unsubstantial particulars, have been influenced by and have presented the same general theory, given full and definite expression by the Supreme Court of California in *Frost v. Railroad Commission of State of California*, 197 Cal. 230, 240 Pac. 26, that, since states may exclude carriers for hire whether common or contract altogether from the public roads, it may affix conditions upon their use of them. * * * Here is no case of compelling private carriers to become common carriers; no case of granting a right, and thereafter arbitrarily or illegally conditioning that right. Here is a case of a clear, a simple, a complete declaration of policy that the public has an interest in the business of carriage for hire over the highways of the state, a prohibition of the right to engage in such business except under a franchise, and an affixing to the enjoyment of a franchise the condition that the holder must become an integral part of the transportation system of the state, and must submit to the regulations applicable to his franchise as to rates and practices. * * * The case comes at last to the one great question, whether those engaged generally in the unregulated business of the carriage of goods for hire may, merely because they carry usually for single individuals and upon special terms, by invoking the Fourteenth Amendment, maintain the right to continue to do such business on the public roads, against the will of the state asserted by statutes that they shall not do so. We think the question admits of only one answer, that the requirements of the Texas statute are valid, and that, if plaintiff and interveners wish to conduct their business on the highways of this state, they must comply with them."

§ 745. **Rate regulation under competitive conditions.**—Competition of motor buses with electric lines naturally has a very marked effect on the revenue of both systems, and it has been held in Michigan, Wisconsin and many other states necessarily that such loss of revenues by existing transportation systems, due to this competition, must be considered in fixing their rates and in passing on applications for increased rates, which ordinarily attend the introduction of such competition. Where the loss is so great as to destroy or even to cripple it, the street car system may be authorized to discontinue its service where sufficient increase in its rates to yield a fair return on its investments is not feasible or possible. The existing systems are entitled to protection from competition up to a certain point. This is necessary in the interest of the public service as well as for the benefit of the established public utility in order that proper investments may be conserved and the public service continued. Increased investments and new capital are necessary to carry on the public service and this will not be available in the absence of satisfactory returns from the present investment.

Where the railway service is sufficient for the public needs, although not entirely convenient for local service, the action of the commission in refusing a certificate for motor vehicle service will be sustained, unless it is shown to be arbitrary or unreasonable. That, in such cases, the commission has a wide discretion and that its judgment should not be supplanted by the court, unless there is good cause shown for doing so, is indicated in the case of *In re Sioux Falls Trac. System*, 56 S. Dak. 207, 228 N. W. 179, P. U. R. 1930C, 294, where the court said: "Petitioner contends that this act is unconstitutional, because it embraces more than one subject, and also because it contains subjects that are not expressed in the title. We are satisfied that this contention can not be sustained. The argument that the act covers not only the supervision, regulation, and control of motor vehicles, but also the giving of indemnity bonds by the bus companies, the taking out of indemnity insurance, and the levying of a gross income tax upon the incomes of the bus companies, and thus includes different subjects which are not expressed in the title, is not persuasive. All of these topics are clearly part of the supervision, regulation, and control of transportation by motor vehicles. The alleged levying of an income tax is simply the mode of collecting compensation for the use of the highways, which compensation is based on a percentage of the gross income. * * * And, in absence of federal legislation

on this subject, state regulations of intrastate business of an interstate motorbus line does not infringe the commerce clause of the federal Constitution. * * *

"Petitioner does not point out wherein the ruling of the railroad commission is arbitrary, and we find nothing in the record indicating that the commission acted arbitrarily or unreasonably. The contention that the ruling of the commission is not in accordance with the evidence can not be considered by this court so long as the order is not shown to be arbitrary or unreasonable. * * * The testimony in substance shows that the railway service is sufficient for the travel needs of the public, but is not so convenient as the bus line which picks up passengers at places in the several towns served, when otherwise they would have to walk to the station, and that the time schedules maintained by the bus line are to a certain degree more convenient than those of the railway. But this court can not substitute its judgment for that of the commission, where there is any substantial basis in the evidence of the finding of the commission. 42 C. J. 692. The statute expressly provides that 'the findings and conclusions of the board on questions of fact shall be final and shall not be subject to review.' We do not deem it necessary to decide whether this provision of the statute can be sustained or not. It is assailed by appellant as placing judicial power in the board of railroad commissioners, and to that extent being unconstitutional. But in the present case we only decide that the finding of the commission is not so lacking of support in the evidence as to justify us in reversing that finding. In determining whether or not a certificate should be issued, the board is required to give consideration to the transportation service that is being furnished, or that will be furnished, by any railroad or any existing transportation agency, and shall also give consideration to the effect which such proposed transportation service may have upon other forms of transportation service which are essential and indispensable to the communities to be affected, or that might be affected."

§ 746. Service the fundamental consideration.⁵—Protecting existing investments, however, from even wasteful competition must be treated as secondary to the first and most fundamental obligation of securing adequate service for the public, and permission should be given motor buses to operate in competition with street railway systems as directly as conditions for secur-

⁵This section of third edition ties Comm., 50 Idaho 651, 299 Pac. 671. quoted in *McFayden v. Public Utili-*

ing such service may require. When given the opportunity, which defines their duty and fixes their obligation of rendering sufficient and satisfactory service to the public, the existing system, no matter what its form, can not complain of competition provided the proper service is not afforded by such system. This is the measure of its duty and obligation to the public and it should be met even before competition threatens.

As service to the public deserves the first consideration, where a railroad company is giving motor vehicle service in connection with its rail service, this service, so far as the public is concerned, is that of a common carrier, the same as though it were rendered by rail, as is indicated in the case of *New York Central R. Co. v. Public Utilities Comm.*, 121 Ohio St. 588, 170 N. E. 574, P. U. R. 1930B, 423, where the court said: "It is conceded by the railroad company that, while it does not own the trucks and trailers, it selects the property which shall be conveyed in the motor vehicles, it picks out the routes which shall be traveled, and indicates the times and schedules under which the vehicles shall travel. Complete supervision of the operation is in the New York Central Railroad Company. The trucks are used exclusively for the railroad, and at every minute of the time of carriage the property transported is under the railroad's control, being handled through the use of bills of lading and waybills, exactly as all other classes of freight. By the use of these trucks the New York Central Railroad Company can not and has not divested the carriage of the features of a common carrier transaction. It still holds itself out to the public as a common carrier of this freight, which it transports upon motor vehicles. It receives this freight in exactly the same way at its freight stations that all other freight transported by its railroad is received. As between the public and the New York Central Railroad Company the transaction is exactly the same as that of transportation by rail."

§ 747. **Regulation varies with statutory provisions.**—The nature and extent of the jurisdiction which the states exercise over motor vehicles, operating as common carriers, being determined by the statutory provisions enacted for this purpose, varies widely in the different states. Maryland was one of the first states to regulate this form of transportation, which provided by chapter 180 of its laws of 1910, as amended by chapter 445 of its laws of 1914, that the term "common carrier," includes all automobiles and motor cars or motor vehicles operated

for public use. While in most states the powers granted the public utilities commissions are very extensive, in some states their jurisdiction applies only to the transportation of passengers. And in New Jersey it is limited to those motor vehicle lines that operate over routes which parallel electric lines, as fixed and defined in chapter 149, section 15, of the laws of New Jersey for 1921. By the act of July 26, 1913, in Ohio the commission was given control only over rates and service and matters of safety in the operation of motor vehicles for hire, but this control did not cover the question of competition with other transportation systems. By virtue of the statute enacted in 1923, page 211, of its laws of that year, however, Ohio requires that a certificate of convenience and necessity shall be obtained from the public utility commission before operating motor vehicles for hire. As in many other states such a certificate is necessary and this is generally conditioned on the giving of a bond or the securing of satisfactory liability insurance against damage to persons or property.

§ 748. California jurisdiction complete outside of municipalities.—Complete jurisdiction over motor vehicles operating as common carriers has been vested in the railroad commission of California, and in connection with its power to regulate all public transportation systems, the commission in this state fixes rates, regulates fares and has general control over every feature of service including matters of safety and accounting. The power of local regulation except for local city service is subject to the control of the commission, which issues permits, in its discretion, as necessary conditions precedent to operate, but with reference to the public service primarily and in accordance with the policy of protecting the existing system of transportation to the exclusion of all others so long as that system affords adequate service.

In this jurisdiction the municipality can not limit the weight carried by motor vehicles on its streets, because this regulation and many others have been exercised exclusively by the state, thereby excluding the municipality, for as the court said in the case of *Atlas Mixed Mortar Co. v. Burbank*, 202 Cal. 660, 262 Pac. 334: "The effect of these several decisions is to declare that, whenever the state of California sees fit to adopt a general scheme for the regulation and control of motor vehicles upon the public highways of the state, the entire control over whatever phases of the subject are covered by state legislation ceases in so far as municipal or local regulation is concerned. * * *

The provisions of the ordinances of said city which purport to limit the operation of such vehicles upon and along its said street, having a gross weight in excess of 6,000 or 8,000 pounds, are void as in violation of the aforesaid provisions of the Motor Vehicle Act wherein the regulation of the weight of such vehicles when used in travel or traffic along improved public highways, whether in or out of cities, is completely covered."

Municipal corporations may impose reasonable license fees upon motor vehicles operating as common carriers over its streets, and may make reasonable classifications for imposing such license fees which may not be uniform except within the particular class, as is indicated in the case of *E. A. Hoffman Candy Co., Inc. v. Newport Beach* (Cal. App.), 8 Pac. (2d) 235, where the court said: "The only requirement of the constitutional provisions is uniformity in the operation of the taxing power and uniformity in the burdens placed upon the license payer. This requirement of the constitution is fully satisfied when the charge imposed is uniform as to the class to which it applies. * * * In the instant case it is admitted, and correctly so, that the only business of appellant conducted within the respondent city upon which the license charge is sought to be imposed is the delivery of merchandise by motor truck over the city streets; that no attempt has been made to collect a license on any other part of appellant's business; that it intends to continue this business without paying any license tax therefor; that this business is not occasional or merely incidental to a business conducted elsewhere. If appellant can escape payment of this license charge, it is evident that any trucking, transfer, or express business operated by means of motor-propelled vehicles wholly within the limits of the city and carrying freight or merchandise from place to place therein and not having a business office will also escape the license charge."

§ 749. **Maine jurisdiction over passenger service.**—In Maine the public utilities commission issues certificates of convenience and necessity in its discretion, but has jurisdiction only over motor vehicles carrying passengers for hire. The statute, being chapter 184 of the laws of 1921, provides that the commission shall have jurisdiction over "every person, firm or corporation operating any motor vehicle upon any public street or highway for the carrying of passengers for hire, and in such manner as to afford a means of transportation similar to that afforded by street railways, and commonly known as the jitney or jitney bus, operating regularly over route between points within this state."

§ 750. **Jurisdiction of commissions.**—The commission has general control over matters of motor vehicles operating as common carriers also in Indiana, Iowa, Colorado, Idaho, Illinois, the District of Columbia, Maryland, Michigan, Montana, New York, North Dakota, Nevada, Ohio, Oregon, Pennsylvania, South Dakota, Utah, Vermont, Virginia and Wisconsin. In New Jersey, however, the board of public utility commissioners has jurisdiction only over motor vehicles operating over routes parallel with electric systems of transportation except such lines as were established and operating at the time of the enactment of chapter 149 of the public laws of 1921.

A decision by the public utility commissioners of the state, granting an extension of service for the public interest and convenience, will be sustained, unless there is a clear abuse of discretion in the action of the commission, for as the court said in the case of *Fornarotto v. Board of Public Utility Comrs.*, 105 N. J. L. 28, 143 Atl. 450, P. U. R. 1929A, 360: "This board is entrusted by the legislature with the power of approving any grant or extension to any public utility made by any political subdivision of the state after the same shall have been fully heard, if the board, in the language of the act, determines that 'such privilege or franchise is necessary and proper for the public convenience and properly conserves the public interests.' Manifestly this delegation of power presents a question of fact for the discretion and determination of the board after hearing the facts in the case. * * * The legislature has seen fit to delegate this power to the discretion of this board, and, unless it appears that the board has reached its conclusion by a manifest violation of the law or by a clear abuse of the discretion vested in it, it is not within the power of this court to disturb the conclusion thus reached, where there is evidence apparent upon which it can be reasonably supported. * * * The test in a case of this character manifestly is not limited to the rate of fare proposed to be charged, but to those considerations of general public advantage and convenience, which might be disrupted if not entirely disestablished to the public detriment, were the existing status disorganized or discontinued."

In granting permission for additional service, it is generally the policy to conserve and protect the existing service, so far as this is adequate, as is indicated by the court in the case of *Hunter v. Board of Public Utility Comrs.* (N. J.), 141 Atl. 90: "The state assumes to regulate the rates for transportation and the character of the service rendered. Morally and legally it should

protect the business of the established utility from impairment and encroachment. To do otherwise would soon create a situation where the public would be without transportation service."

This same court in a later case, however, indicated the limitation on this rule in holding that the existing service must be not only adequate but similar to the one proposed, before it can be denied as a matter of public convenience, for as the court said in the case of *West Jersey Seashore R. Co. v. Board of Public Utility Comrs.* (N. J.), 149 Atl. 269, P. U. R. 1930D, 206: "But the railroads claim that the local bus trade will cut into the local business by railroad; to which the reply is made, and satisfactorily to us, that, as the railroads relied for almost all their passenger business on fast through trains, of which as a matter of common knowledge large numbers are operated every day, and local service was limited to one or two trains each way, it is difficult to see how they have been or will be injured to any appreciable extent by local bus facilities. If, as they claim, they are entitled as public utilities to protection against destructive competition, it should be a competition with a service which they have been giving."

Classification for the regulation of motor vehicles operating for hire over state highways as a matter of protection to the highways, which is based on the number of decks on the vehicle, rather than on its weight, is set aside as unreasonable by the court in the case of *Pennjersey Rapid Transit Co. v. Camden* (N. J.), 142 Atl. 821, where the court said: "The number of decks on an autobus does not seem to present a substantial basis for classification for regulations to conserve the highways; the weight and not the height of the vehicle would seem to bear relationship to the evil designed to be prevented, for the preservation and proper maintenance of the streets of the city."

In the regulation of motor vehicles operating as common carriers over its highways, the state may require the securing of a franchise and provide for its transfer, so that when there is a transfer of such franchise the parties securing the franchise assume the liability provided by its terms, whether existing at the time of the transfer or arising thereafter, for as the court said in the case of *Shattuck v. Pickwick Stages Corp.* (Kans.), 11 Pac. (2d) 996: "The result of the foregoing is we have the familiar case of a corporation holding a public franchise, disposing of its franchise and property to another company, which continues the business under the franchise, but insists the creditors of the first corporation shall hold the sack. The court holds that a

motor carrier which succeeds to the business, rights, assets, and franchise of another motor carrier succeeds to existing liabilities to the extent of assets acquired. Under the motor carrier law, the special privilege conferred by the certificate issued to Pickwick Stages was burdened with liability resulting from negligent conduct of the business. Pickwick-Greyhound Lines was not just an ordinary purchaser of property. It desired, not merely the business and assets, but the particular special privilege which Pickwick Stages held. Pickwick-Greyhound Lines was bound to know the law. The law provided that it took the certificate as if the certificate had been issued to it originally. The order transferring the certificate specified that it assumed existing liabilities under the certificate. It took the benefit burdened with the corresponding obligation."

Where motor vehicles are operating for hire over the highways of the state and are holding themselves out as ready to serve the public generally they may be regulated as common carriers, although they claim to be private because they made contracts for each service. This principle is restated and discussed as follows in the case of *Motor Freight v. Public Utilities Comm. (Ohio)*, 181 N. E. 479: "It now employs about forty-five independent truck owners, who transport its freight, and it retains and exercises the power of discharging them for inadequate service. It has checking stations along its routes for registering the trucks, and, if there be a breakdown of equipment, it employs other truck owners to pick up the freight and carry it to its destination. The record discloses that, while it had some twenty-five or twenty-six firms which it called 'customers,' it was open to shipping engagements for hire with any other shipper who desired transportation. * * * There is ample evidence that the plaintiff in error was not engaged merely in carrying out its existing contracts, but that it negotiated contracts from time to time with other shippers having goods for transportation. That it was open to future engagements with various shippers indiscriminately is shown by the secretary and treasurer's testimony. * * * The testimony as a whole supports the conclusion that the plaintiff in error not only advertised that daily service would be furnished, but that it negotiated carriage of freight from any of the public who had goods to ship, and accepted it if the remuneration was sufficient. * * * We are of the opinion that the commission rightly came to the conclusion that the plaintiff in error can not pose as a private carrier by the simple device of making and accepting what it

terms private contracts with an unlimited number of future shippers, and thereby secure the privileges accorded common carriers without assuming any of their duties or obligations. If intrastate operators were to employ similar methods of doing business, and thus evade the responsibilities that common carriers generally assume, the field of motor regulation by the public utilities commission would be extremely limited. * * * There is here presented no question of the prohibition of the use of the state highways, but only the attempt by the public utilities commission to require the plaintiff in error to register subject to the lawful conditions which may be imposed."

§ 751. **Massachusetts favors local control.**—The policy of Massachusetts is that of local regulation and control. General authority was conferred by chapter 293 of the Laws of 1916 on cities and towns, accepting the provisions of this statute, to license and regulate the transportation of passengers for hire by motor vehicles. The privilege of operating such transportation systems is subject to such conditions as the local authorities may impose, which in turn is subject to the right of appeal to the state department of public utilities, which may alter, amend or revoke the local order or license. Thereupon or at any time thereafter the state department may make such rules and regulations and impose such conditions on the operation of motor vehicles as it may desire, and from such order the local authority has no appeal. By virtue of statutory authority all bonds and other security required for the safe and proper operation of such motor vehicles are deposited with the local authority where the particular line operates as the condition for issuing a license permitting them to render transportation service.

A municipality may require motor vehicles operating for hire on its streets to secure local licenses and to file bonds, under proper statutory authority, as is indicated by the case of *Boston & Maine Rd. v. Hart*, 254 Mass. 253, 150 N. E. 212: "The defendant has had no licenses at any time for carrying on his business in any of the cities or towns through which his buses run, such as were and are required by G. L., c. 159, section 45, both before and after its amendment by St. 1925, c. 280. The defendant has filed no bond to pay specified damages as required by the city ordinance of Boston and G. L., c. 159, section 46. The defendant competes directly with the plaintiff for the carriage of passengers. He is operating motor vehicles for the carriage of passengers for hire over the public highways between fixed and

regular termini and in a manner similar to street railways. That operation has caused a direct and substantial loss of revenue to the plaintiff."

This same court indicated that motor vehicles operating for hire may be required to secure licenses and permits of municipalities through which they pass, although they may be engaged in interstate commerce, especially where they are also doing an intrastate business. This principle is established and discussed as follows in the case of *Barrows v. Farnums Stage Lines, Inc.*, 254 Mass. 240, 150 N. E. 206: "It is plain that statutes requiring local licenses, certificates and permits for the transaction of the business within the state of transporting passengers for hire over the public ways are valid. The ground on which the validity of such statutes rests is that the legislature has power, by virtue of public ownership of the easement of travel over highways, to exercise reasonable control over travel on them in the interest of the general welfare. They may also be justified under the general police power of the states. * * * If an interstate carrier by motor vehicle desires at the same time to transport passengers for a journey wholly within the commonwealth, he can not do so in conformity with the statute without first obtaining the specified licenses and certificates. * * * Those engaged in interstate commerce can not use the highways of this commonwealth except subject to such reasonable regulations in the interests of public safety as the statutes permit."

In upholding an ordinance requiring taxicabs to use fixed stands for their parking as a matter of local traffic regulation, the court spoke as follows in the case of *Commonwealth v. Rice*, 261 Mass. 340, 158 N. E. 797: "The rule in the case at bar which required taxicabs, and vehicles used for the carriage of persons and things for hire, to make use of taxicab stands, tends to the control of public traffic, protects persons from annoying solicitation, prevents confusion, disorder and danger in the streets, and is a reasonable regulation. * * * No right of any citizen is impaired by an ordinance which prohibits the parking of vehicles at a place in a public street or highway where such person has no legal title to the land occupied by the street or highway and has no interest in such greater than an easement of travel which is held in common with all citizens."

§ 752. Right to pass upon highways common to all.—The right of any citizen to travel upon the streets and highways and transport his property thereon in the ordinary course of life and business is common to all and while these rights may be regu-

lated in the interest of safety and the common good so as to secure the same privilege uniformly for all, still such use of private transportation for oneself and property is generally recognized as the ordinary and proper use of all highways. It can not be denied or unduly infringed, for the right to pass along and upon our streets and highways is common to all and is indeed the very use and purpose for which these avenues of transportation were constructed. Any interference with this use of them is carefully guarded and may be denied or regulated as best suits the common interest and right of all.

The right to use the streets and highways in the ordinary course of the day's business as a means of transportation of one's person and property is properly distinguished from the right to transport property and passengers for hire thereon, as is clearly indicated in the case of *Harrison v. Big Four Bus Lines*, 217 Ky. 119, 288 S. W. 1049: "Appellants fail to distinguish between the right of a citizen to use the public highways in the ordinary course of his business and the right to use them as a place wherein to conduct a private business such as operating motor vehicles for hire. The state, under its police power, has the right to prohibit the use of the highways as places of private business, such as appellants seek to carry on, or to grant the right to one and refuse it to another. Chapter 112 of the Acts of 1926 reenacted all of the essential features of chapter 81 of the Acts of 1924, the principal change made being the creation of the office of commissioner of motor transportation and the transfer to such commissioner of the power and authority vested in the state highway commission by the latter act. * * * In the 1926 Act motor vehicles having a carrying capacity of five passengers or less were made subject to the same regulations as cars having a larger capacity, and the inclusion of such vehicles in a classification that rendered them subject to the regulations complained of was a matter within the legislative power. The power of the legislature to enact such regulatory laws is clearly pointed out in *Reo Bus Lines v. Southern Bus Line Co.*, 209 Ky. 40, 272 S. W. 18, *supra*, and the cases therein cited and approved. Later cases from other jurisdictions to the same effect are *State v. Johnson*, 75 Mont. 240, 243 Pac. 1073; *Smallwood v. Jeter* (Idaho), 244 Pac. 149; *Greeley Transportation Co. v. People* (Colo.), 245 Pac. 720; *Gilmer v. Public Utilities Commission* (Utah), 247 Pac. 284; *In re James*, 99 Vermont 265, 132 Atl. 40."

Under a statute providing for the taxing of motor vehicles for hire on the streets of a municipality, no authority is given for taxing driverless motor vehicles; as they are properly classed separately, and not operated for public hire, but only for the use of the party renting them for the time being with the privilege of driving them themselves, they are not subject to such tax, for as the court said in *Campbell v. Groh* (Tex. Civ. App.), 8 S. W. (2d) 712: "We do not find anything in the tax law that defines driverless motor cars as coming within any provisions of that act. It seems to be a situation in the automobile passenger service *sui generis*. * * * The items upon which assessments are levied for taxes are never left to conjecture, but are definitely defined. These automobiles are used for the purpose of hire to those who wish to use them, without any driver, and for their own use and not in transporting passengers for fares. The proof shows that appellees' automobiles are not used as buses, as above defined. They are for the time being controlled solely by the hirer and are not open to any, nor intended for all passengers. We see, after a careful review of the statutes, that no reference is made to driverless cars in any provisions of the law requiring the owners thereof to pay motorbus taxes."

The business of leasing automobiles for the use of the lessee, personally and not for profit, in carrying passengers under the drive-it-yourself plan is not properly taxable under a provision for the taxing of private or public carriers, for as the court said in the case of *State v. Dabney*, 176 Ark. 1071, 5 S. W. (2d) 304: "The appellee, George Dabney, operates a business in the city of Little Rock under the style or name of Drive-It-Yourself Company. He owns twenty-three automobiles, all passenger cars, and includes coupes, sedans, and touring cars. He conducts his business by leasing them to the customers who come to his garage where they are kept, under a contract in printed form, the customer himself being in exclusive control of the car during its operation. He does not have in his employ any drivers or chauffeurs, does not drive the leased cars himself, nor operate a jitney, taxicab line, or motorbus business. * * * The undisputed testimony shows that the appellee was not engaged in the business of operating a jitney, taxicab, or motorbus line, but only in renting or hiring to individuals, who applied therefor, cars of different styles and sizes to be operated by the hirer at his own risk and discretion. Such operation of such business did not constitute appellee either a private or public carrier of passengers or his business the using of motor vehicles for the trans-

portation or delivery of persons or passengers for hire within the meaning of the act. He was not a carrier of passengers at all, nor liable to the payment of the additional tax required."

While the use of streets and highways is available to the public generally, it is subject to regulation in the interest of public safety and general good, so that the parking of vehicles along the highways or in the streets of municipalities is a proper subject of regulation, which may cover all traffic whether for pleasure or profit. This principle is established and discussed as follows in the case of *Flynn v. Bledsoe Co.*, 92 Cal. App. 145, 267 Pac. 887: "Section 136 of the Motor Vehicle Act of 1923 relates to stopping upon the highway, and does not contain one word as to the manner of parking vehicles within the corporate limits of cities and towns. It does not purport to be exclusive upon that subject, but is absolutely silent thereon. It requires only a casual reading of section 136 of the Motor Vehicle Act of 1923 to enforce the conclusion that the legislature had in mind only the stopping of motor vehicles on highways outside of cities and towns where the improved portion of the highway would be confined to a comparatively narrow portion thereof, leaving ample space on both sides of the improved strips for stopping automobiles or other vehicles needing immediate repair or mechanical adjustments. Nor does section 145 of the Motor Vehicle Act of 1923 in any particular limit or control the power of cities relative to the method or manner of parking automobiles upon the streets thereof. * * * The legislature not having legislated as to the method or manner of parking vehicles on the streets of cities and towns, there can be no conflict created by a city ordinance regulating the same."

That the state has the power to exact a license fee or tax from all motor vehicles, whether operating for hire or not, for the construction and upkeep of its highways is the generally recognized rule which is well expressed as follows in *Ex parte Freie*, 42 Okla. Cr. 57, 274 Pac. 684: "In our judgment, this chapter provides a means for the collection of the tax or license fee, and provides a civil penalty in the event of delinquency. * * * Rather than being an ad valorem tax, it would appear that the legislature has levied what is known as a license fee or license tax, and that, by the provision above quoted [section 1, chapter 16, Session Laws 1927], such fee is in lieu of the usual ad valorem tax. * * * The regulation of the operation of motor vehicles upon the public highway is a valid exercise of the

police power. It is a matter of common knowledge that vast sums of money are being expended by the state and its subdivisions in improving the public highways, and it is extremely important under the condition of travel at this time that motor vehicles be so marked that identification can be readily made. The legislature may provide the conditions upon which persons owning or operating motor vehicles may use the public highways, and may provide for fine and imprisonment for violating the regulations made, and that is all the particular sections of the statute in question do. With this view of the law, it is unnecessary that we determine whether or not the license tax provided is a debt within the meaning of our constitution."

§ 753. Use of highways for profit a special privilege.⁶—This private use of our streets and highways obviously differs very radically from that of converting them into places of business and using them for private gain or profit, such as operating motor vehicles thereon for the transportation of the public and its property for hire. This use is special and extraordinary and may only be enjoyed as a privilege or licensed permission on such conditions as the state or its duly authorized agency may see fit to impose. The operation of motor vehicles for hire, being a privilege and not a right, may be granted or withheld as the state may determine, and, if granted, the state may decide to whom and under what conditions the grant shall be made. As permission to employ the highways to conduct business thereon for private gain may be entirely denied, it follows that the privilege may be extended on such conditions as the state may determine.

Under the right of the state to regulate the use of its highways by motor vehicles operating thereon for hire, the state may classify this service in fixing the tax to be imposed for the construction and maintenance of its highways by putting the motor vehicles operating on regular schedules and routes in one class, and those not so operating in another. The right to exact a charge, however, from such motor vehicles for the benefit of the highways they use is generally recognized under proper statutory authority, for as the court said in the case of *Raymond v. Holm*, 165 Minn. 215, 206 N. W. 166: "It is conceded that the truck in question was engaged in commercial freighting between the cities of Minneapolis and St. Cloud on a regular time and route

⁶This section of third edition
quoted in *Denny v. Muncie*, 197 Ind.
28, 149 N. E. 639.

schedule. * * * It is difficult to see how or wherein they are discriminated against. Trucks engaged in commercial freighting which are operated on regular time or route schedules are put in one class, those which are not operated on such schedules in another. It is beyond question that the relators may place their truck in either class at their own option. Where a person has a free choice and of his own volition places his property in a particular class, he is hardly in position to claim discrimination because that class is subjected to burdens not imposed upon another class in which he could have placed it, and in which he may still place it if he chooses to do so. * * * The tax is imposed to provide funds for constructing and maintaining the public highways and only on motor vehicles using such highways. * * * We can not pronounce the differences so wanting in substance that the classification is purely arbitrary and therefore invalid. * * * It is imposed only on motor vehicles using the public highways and is devoted exclusively to the improvement of such highways. It provides highways of a character necessary for the convenient and economical operation of these vehicles, and is of direct benefit to the owners thereof. It is primarily a property tax, but, in a sense, is also a privilege tax, for all motor vehicles are prohibited from using the public highways until the tax is paid."

This same court in a later case, however, indicated a limitation on the right to make a charge for the benefit of the state highways, and where the operation was wholly within a municipality of the state and an adjoining state, the court held that they were subject only to a tax for operating wholly within the limits of a municipality, because the additional operation was beyond the state, where the state has no authority to require such payment, for as the court said in the case of *Wickman v. Holm*, 166 Minn. 26, 206 N. W. 705: "We are of the opinion that the registrar used the wrong basis for calculation of the tax. These buses operated between the cities of Duluth and Superior; Superior is no part of Minnesota. So far as Minnesota is concerned, these buses were operated wholly within the city of Duluth, using only the highways of that city. Under chapter 418, p. 3, Laws 1923, these vehicles were subject to a tax of two and three-fourths per cent only, the same rate applicable to motor vehicles of the same character operated wholly within the limits of the same city. We are of the opinion and hold that the vehicles in question were not engaged in carrying passengers for hire, between points not wholly within the limits of the same city, within the meaning

of the act, and therefore were not subject to the ten per cent tax, and that the registration should have been made."

This same court in a still later case sustained the right of the state by proper statutory enactment to classify motor vehicles carrying farm products as such, because they are lighter, and move slower, and, therefore, wear the highways less than motor vehicles hauling freight for hire on regular routes, especially as much farm produce passes over unimproved highways. The court further sustained a classification between delivery trucks and those used as drays for hauling freight between municipalities, as is indicated in the case of *McReavy v. Holm*, 166 Minn. 22, 206 N. W. 942, where the court said: "Loads to and from the farm are necessarily lighter, move slower, and consequently [there is] less wear and tear to the surface of the roadbed than results from trucks ordinarily used in connection with mercantile industries as delivery trucks in villages and cities, or those hauling freight for hire on a regular route, where heavy loads and cheap rates are the criterion without regard to the use made of the highways. In hauling from the farm, much of the highways used are unsurfaced. But comparatively few farms abut upon trunk lines, while delivery trucks and scheduled drays move very largely over paved highways. All such matters should be and are considered by the legislature in determining upon the classification of such vehicles for the purpose of taxation. * * * The contrast between the use of the highway, by the ordinary socalled delivery trucks and trucks used as drays for hauling freight from one town to another, is so well understood as to require no extended discussion here."

This court also indicated that a warehouseman is not subject to this highway tax for transporting goods between fixed terminals or over regular routes, because the service is no more fixed than the routes are regular, but is similar to the service rendered by the ordinary drayman, for as the court said in the case of *State v. Boyd Transfer &c. Co.*, 168 Minn. 190, 209 N. W. 872: "The first question presented is whether the *Boyd Company*, in that portion of its business now under consideration, is a common carrier. It is primarily a Minneapolis warehouseman. * * * Even if it is a common carrier, defendant is not subject to the act, unless it is transporting goods 'between fixed termini or over a regular route.' * * * The termini of defendant's hauls are no more fixed than its routes are regular. They are no more fixed or regular than are those of the ordinary drayman. * * * The definition itself, as well as its context,

shows an intent to exclude rather than include such a general transfer business as that of defendant which hauls as occasion requires, and not over routes or between termini made regular or fixed by predetermining plan or custom."

Motor vehicles operating for hire over the state highways, even though engaged in interstate commerce, may be required by the state to secure a license and pay a tax for the privilege; and, until applying to the commission for the license, they are not in position to object to the requirement of the statute for a liability bond. This principle is established and discussed as follows in the case of *State v. Martin*, 210 Iowa 207, 230 N. W. 540, P. U. R. 1930E, 417: "That defendant is operating in this state as a motor vehicle carrier and therein using the public highways of the state for his own private profit in the operation of his private business is conceded. He asserts that he is operating only in interstate commerce. This is not denied by plaintiff. Defendant is making use of the highways of the state from one end to the other as a carrier. It would be difficult almost to the point of impossibility for the state to refute defendant's contention that he is not engaging in intrastate carriage. This fact furnishes strong argument for the applicability of the statutory license requirement in order that proper supervision may be exercised and evasion avoided. * * * In short, defendant proposes to dictate his own conditions as to when he will pay the tax and as to what regulations he will concede to be reasonable and authorized and when he will comply with them. He stands here defying the license requirements of the state on the asserted ground that the law is unconstitutional in one particular, namely, that the requirement of a liability bond unreasonably burdens interstate commerce. * * * Defendant had made no application to the commission. He has not invoked its discretionary powers, nor has he complied with the provisions of the law so far as they are applicable to an interstate carrier. Not having applied for a license and not having been denied a license for illegal reasons, the contention that illegal requirements might be made is not open to him if the board had authority to grant the license without requiring compliance with such illegal conditions, *State v. Dowling*, 204 Iowa 977, 216 N. W. 271; *Milwaukee v. Rissling*, 184 Wis. 517, 199 N. W. 61. The requirement for insurance is valid as to interstate carriers if limited to damages suffered within the state by persons other than the passengers."

§ 754. **Right of state to regulate use of its streets and highways.**⁷—The power of the state thus to regulate the use of its public thoroughfares is as fully established and generally recognized as the police power itself upon which it is founded. And as it includes the power to prohibit, the conditions of its exercise and enjoyment are subject to the broadest restrictions and regulations consistent with equality and other constitutional property rights. In fact few legal propositions are more fully and firmly established than the right of the state in the exercise of its police power to regulate or prohibit the use of its streets and highways as places of private business, or as the chief instrumentality of conducting such business as that of operating motor vehicle systems for profit.

A statute regulating the use of the state highways by motor vehicles operating over them for hire, in serving a number of concerns according to a series of contracts with them, will be upheld as a proper regulation of the use of the highways, as a means of providing for their construction and maintenance, and in the interest of the public welfare and safety in the regulation of public traffic. This principle is established and discussed as follows in the case of *Barbour v. Walker*, 126 Okla. 227, 259 Pac. 552, P. U. R. 1928A, 623, where the court said: "With the advent of the automobile, our mode of travel was transformed in less than a decade. This transformation required a change in our system of highway construction from that of the ordinary improvised dirt roads to that of the highly improved and hard-surfaced roads. This accelerated the establishment of our state highway department whereunder we are now expending millions of dollars annually to meet the requirements of the traveling public. Speed laws were found to be necessary to maintain order and to minimize danger in the use of the highways. * * * The law is based upon the theory that the individual citizen has no vested right to use the highways of the state for private enterprise to the detriment of the general public, and that where the individual interest conflicts with the public interest, as must be the necessary result in the use of the public highways for private purposes without regulation, the government is never impotent to protect the public welfare. * * * We therefore regard the case of *Ex parte Tindall*, 102 Okla. 192, 229 Pac. 125, as conclusive upon the propositions here involved, unless, as defendants

⁷This section of third edition quoted in *Gilmer v. Public Utilities Comm.*, 67 Utah 222, 247 Pac. 284.

contend, that by virtue of their being private motor carriers and having never held themselves out to the public as common carriers, the case of *Frost v. Railroad Commission*, 271 U. S. 583, 46 Sup. Ct. 605, 70 L. ed. 1101, 47 A. L. R. 457, is controlling. * * * The effect of the state's construction of the law was that a private motor carrier operating under a single contract was converted into a common carrier by legislative fiat, and this the national court denied as being in contravention of the due process clause of the Fourteenth Amendment. And following up the state's theory, the court further held that it was not within the power of the state to grant a privilege which required the relinquishment of a constitutional right. * * * Thus the distinction between the California case and *Ex parte Tindall*, the case here controlling, is clear, in that the California law was held to be a regulation of the business of a private carrier, whereas the law in this state is a regulation of the use of the highways by motor carriers. Moreover, a further distinction appears between the California case and the one now in hand, as in that case the transportation company was operating as a private carrier under a single contract with a single concern, while in the case at bar the defendants were operating under five separate contracts with as many different firms dealing in different classes of commodities on a large scale. * * * This language of the court is pertinent here, and indeed is most persuasive to support the conclusion reached by the trial court, that, since the defendants were operating under five separate distinct contracts with as many principal concerns of Oklahoma City, they had in effect resolved themselves from the character and status of private motor carriers not subject to regulation, if such in fact was the case, to that of public motor carriers, and thus by their own conduct of their enterprise had completely brought themselves within the provision of law regulating the use of the public highways for private gain. In view of the dissimilarity of the theory of that case with the *Tindall* case and likewise in the facts with the case at bar, as above pointed out, it is our judgment that the principles laid down by the Supreme Court of the United States in *Frost v. Railroad Commission* are not here controlling. For these reasons, therefore, we conclude that the judgment of the district court was right, and it is accordingly affirmed."

Where a tax may be levied on motor vehicles for the use of the highways, it may be graduated according to the amount of use and the wear and tear caused by the use of the motor vehicle. In sustaining a tax of this kind, graduated according to

the weight and the extent of the use of the highway by motor vehicles, the court said in the case of *State v. Kozer*, 116 Ore. 581, 242 Pac. 621: "In determining whether the classifications in question are reasonable, it is important to give due consideration to the general purpose and spirit of the Oregon motor vehicle laws. It is apparent, even from a casual reading of the same, that the legislature intended to impose upon those who most use the public highways of this state the greatest part of the burden of repairing and maintaining them. This policy, as a matter of abstract justice, is unquestionably sound. * * *

As it is reasonable to require a greater fee for the operation of heavier automobiles because of damages sustained by the roads, it is likewise just and equitable to exact higher fees of owners who are given the right and privilege of operating their motor vehicles over a greater extent of highways. This law makes no distinction among those of the same class. It treats all alike who are similarly situated, and thereby meets the constitutional requirement that all citizens must be given equal protection of the laws."

As the power to regulate includes the power to prohibit, the state commission may grant a certificate for only a part of the service applied for, where there is already service for the remainder of the route, and unless there is a clear abuse of authority, the court will not attempt to substitute its judgment for that of the commission, for as the court said in the case of *Campbell v. Eldridge*, 206 Iowa 224, 220 N. W. 304: "On December 8, 1925, Conard, with the written consent of the lessee, Richardson (Iowa Motor Transit Company), and with the approval of the commission, transferred all his right, title, and interest in said certificate to Eldridge. It is thus manifest that Eldridge is a person whose rights or interests would be affected by the granting of the proposed application, and is a proper party to make objections thereto. Appellant's contention at this point is without merit. * * *

The commission granted appellant a certificate of authorization as between Osceola and Indianola, but denied the same as between Indianola and Des Moines. Under section 8, c. 5, of the the Laws of the Forty-First General Assembly (now section 5105a18 of the Code), the commission may grant the application in whole or in part upon such terms, conditions, and restrictions and with such modifications as to schedule and route as may seem to it just and proper. The proposed route of the applicant from Osceola to Indianola is the same as that over which Richardson (Iowa Motor Transit Company) previously operated. After the revoca-

tion of Richardson's certificate, there was not in existence any certificate of authorization for the operation of motor buses between said two points. The proposed route of the applicant between Indianola and Des Moines is identical with the route over which motor buses are operated under certificate No. 47. * * * It is unnecessary to further particularize with reference to the evidence. It is sufficient to say that there is evidence in support of the findings and conclusion of the commission, and nothing to show an unreasonable or arbitrary abuse of power. It is shown by the record that the board of railroad commissioners had jurisdiction, and it is not shown that said board, in the determination of the matter before it, acted illegally or without authority. It is not for the district court or this court to determine whether the board acted wisely, nor can the court substitute its judgment for that of the commission."

Under its power to regulate motor vehicles operating for hire on its public highways, the state may levy a tax, in exchange for this privilege, for the building and maintenance of its highways; and in doing so may classify such motor vehicles operating over the regular routes on fixed schedules in one class and place all other such commercial vehicles in another class, for as the court said in the case of *Iowa Motor Vehicle Assn. v. Board of Railroad Comrs.*, 207 Iowa 461, 221 N. W. 364, P. U. R. 1929A, 28: "It may be observed that the act in question recognizes and expressly declares the creation and levy of a tax for the maintenance and upkeep of the public highways. * * * It is the prerogative of the legislature to classify property for the purpose of taxation. It has done so in the instant matter. It has placed motor vehicles, engaged as common carriers in the transportation of passengers and freight over regular routes, on scheduled trips and between fixed termini, in one class, and all other commercial and miscellaneous motor vehicles in another class. * * * The state may reasonably regulate the manner and extent of the use of its public highways by common carriers, and the quantum of the privilege tax for the use of the highways need not necessarily be limited to the actual cost of such regulation, but may also, as in the instant case, include compensation for the use of highways and provision for anticipated repairs and improvements thereon. The statute in question is not class legislation because it applies only to common carriers of fixed routes. * * * It is not an unreasonable classification for the legislature to make a distinction between those common carriers whose use of the highway is regular and hence more fre-

quent and whose operation is attended with great danger of life and property and great damage to the highways, and those carriers whose use of the highways is only occasional and spasmodic. We can not escape the conclusion that under the record the appellants belong to and comprise a class entirely separate, distinct, and different from the other motor vehicles operating over the highways of this state."

That the state has the power to tax automobiles under a special classification as such, without violating any constitutional provision, is clearly established as follows in the case of *Kitagawa v. Shipman*, 54 Fed. (2d) 313, where the court said: "The question involved is whether or not the taxation of automobiles by special classification thereof is so palpably arbitrary as to amount to a denial of due process of law within the meaning of that term as used in the Fifth Amendment to the Constitution of the United States. * * * We have quoted somewhat extensively [see report] from the decisions of the Supreme Court of the United States dealing with the subject of taxation as affected by the Fifth Amendment to the Constitution of the United States for the purpose of making it manifest that the tax imposed by the legislature of the Territory of Hawaii upon automobiles in no wise violates the provisions of the Fifth Amendment, although we think that the decision of the Supreme Court in *Toyota v. Hawaii*, 226 U. S. 184, 33 Sup. Ct. 47, 57 L. ed. 180, supra, so definitely settles the question as to render unnecessary any extended discussion of the subject."

§ 755. **Regulation for public good.**^a—The power to prohibit includes the power to regulate even to the extent of prohibition, and the reasonableness of the conditions of regulation may only be questioned in the light of constitutional provisions and limitations imposed upon the legislature. As no one has the inherent right to use the streets and public thoroughfares as a place wherein to conduct a private business, permission so to use them may be afforded certain parties, but always subject to the right to regulate and control their use in the interest of the public and for the common good of all. The public safety and the general business policy of providing public service are logical and necessary questions to consider in determining the nature and extent and in defining the conditions of public regulation and control of motor vehicles operating as common carriers.

^aThis section of third edition quoted in *Gilmer v. Public Utilities Comm.*, 67 Utah 222, 247 Pac. 284.

The right to regulate generally includes the right to prohibit, especially where the existing motor vehicle service is adequate for the public service, and where the evidence shows that the existing service is not carrying its full capacity, the discretion of the commissioner in denying a certificate for additional service should be sustained, for as the court said in the case of *Barnes v. Consolidated Coach Corp.*, 223 Ky. 465, 3 S. W. (2d) 1087: "On November 4, 1926, J. W. Barnes, Jr., made application for a permit to operate a motorbus line between Bardstown and Louisville, Ky. The application was refused by the commissioner, and thereupon Barnes brought this suit in the Franklin circuit court to set aside the judgment of the commissioner. * * * The Safety Motor Carriers and the Reo Bus Lines Company each filed before the commissioner a protest to the application of Barnes on the ground that the public convenience and necessity did not warrant the additional service. * * * The proper construction of that section was before this court in *Red Star Transportation Company v. Red Dot Coach Lines et al.*, 220 Ky. 424, 295 S. W. 419. In that case it was held that to warrant the issuing of a permit it must be a necessity and convenience for the public. In that case it was further held that section 4 of that act (Ky. St. Supp. 1926, section 2739j4) is a limitation upon the number of companies entitled to permits, and it was not intended to direct the commissioner to foster competition by giving permits to two companies in all cases. * * * These two opinions settle all the questions of law made in this case and leave only the questions of fact. * * * These buses are now only about one-third full most of the time. The commissioner is given a discretion in this class of cases, and his judgment when approved by the circuit court will not be disturbed here unless against the weight of the evidence."

This same court in a later case refused to sustain the action of the commissioner in permitting an additional service by another company before permitting the existing company an opportunity to increase its service in order to take care of all of the business, because this plan prevents competition and duplication of service which is not generally favored by the courts and does not insure the most efficient and economical service. This principle is established and discussed as follows in the case of *Red Diamond Bus Line Co. v. Cannon Ball Transp. Co.*, 233 Ky. 482, 26 S. W. (2d) 28, P. U. R. 1930E, 257: "Under this statute, the commissioner is not authorized to grant an application for a

permit over a route where two or more lines have already been established unless two things concur: (1) insufficiency of present service; (2) refusal to put on sufficient service. Here the two lines had already been established between Ashland and Greenup. To that extent the service proposed to be rendered by the applicant was competitive. In the circumstances, the statute applies. The commissioner found that the existing service was not adequate. He did not notify protestants of that fact, and give them a reasonable opportunity to put on sufficient service. On the contrary, he granted the permit although protestants had not refused to put on sufficient service. * * * The statute in question deals only with the sufficiency of the service. It does not make the sufficiency of the bond furnished by those already holding a permit a ground for granting the additional permit. The furnishing of a bond or policy of insurance is a prerequisite to the obtention of a certificate. * * * On the return of the case the commissioner will hear evidence on the sufficiency of the present service, and, if he finds it insufficient, will give the protestants a reasonable opportunity to put on sufficient service. He will not grant the permit in toto sought by the applicant until and unless it is shown to his satisfaction that the present service is insufficient, and that the protestants have refused to put on sufficient service."

That a privilege tax may properly be levied on motor vehicles for the privilege of using the highways for business purposes is the effect of the decision in the case of *Gates v. Reese* (Ark.), 50 S. W. (2d) 236, where the court said: "A demurrer was filed to the complaint which was overruled, and the case was tried upon the following agreed statement of facts. * * * 'That the petitioners operate what is known as a wrecker and use it for the purpose of going out on the highways and streets to tow disabled automobiles into their garage for repair and while so doing they carried automobile parts, oil, gasoline, tires, etc., and they hold themselves out to the public as ready to undertake this service in the city of Hot Springs and along public highways in the country and by advertising, they solicit patronage of the public and do a general business with the public and solicit business from the public.' * * * Under the ruling in the case of *Merchants' Transfer & Warehouse Co. v. Gates*, 180 Ark. 96, 21 S. W. (2d) 406, the business conducted by appellee comes clearly within the statute under the agreed statement of facts, and is subject to the four per cent privilege tax provided for in section 67 of Act No. 65 of the Acts of 1929 (page 335). This class of

motor vehicles was not exempted by Act No. 239 of the Acts of 1931 (page 748) from the collection of the four per cent privilege tax as contended by appellee."

Under its police power and by virtue of statutory enactments motor vehicles operating on the public highways are subject to the regulation and control of the state, for as the court said in the case of *People v. Thompson* (Mich.), 242 N. W. 857: "It is settled in this state that use of automobiles on public highways is subject to regulation under the police power. *Stapleton v. Independent Brewing Co.*, 198 Mich. 170, 164 N. W. 520, L. R. A. 1918A, 916; *Bowerman v. Sheehan*, 242 Mich. 95, 219 N. W. 69, 61 A. L. R. 859. And, under the police power, if public welfare or public safety requires regulation of the use of such property, the otherwise private right of unrestricted use must yield to the public exigency. *People v. Smith*, 108 Mich. 527, 66 N. W. 382, 32 L. R. A. 853. Further, in passing upon the validity of the provisions of this Uniform Motor Vehicle Act, it must, not only be viewed as a police regulation, but also as an enactment under which one is granted the privilege or license of operating a motor vehicle upon the public highways. By constitutional provisions, the control of highways is vested in the state and its municipal subdivisions. Michigan Constitution, article 8, sections 26, 27, and 28. * * * As against the objections urged, we are of the opinion that the act in question is valid."

Although motor vehicles operating as common carriers upon the highways may be regulated and required to pay a reasonable tax for this privilege, the state of Tennessee by virtue of its statutory enactments did not confer the power on a local county or community to levy a privilege or occupation tax on motor vehicles unless their situs was situated in the particular county levying the tax, for as the court said in the case of *Johnson Transfer & Freight Line, Inc. v. Marion County* (Tenn.), 50 S. W. (2d) 229: "In practice it appears that the complainant, except for passing through Marion County with its trucks, has confined its business therein to 'occasionally putting off small amounts of freight at Dove and Monteagle.' * * * So, under its certificate of convenience and necessity, the complainant may do some business in any of the counties along its prescribed route. If one of these counties, not the county of its situs, may levy this privilege tax, all may. Such a result, in our opinion, was not within the contemplation of the legislature. * * *

The activities of this complainant in Marion County have not been sufficient, as a matter-of-fact, to constitute doing business in that county. It has done practically nothing there, except to run its trucks through that county on a highway maintained by the state."

§ 756. Regulation of use of highways by state.—The regulation of such motor vehicles, as already indicated, may be directly by the states, acting through their legislatures, indirectly by municipal corporations, by public utilities commissions, as is becoming more general each year and which promises soon to become well nigh universal, or such regulation may be partly by the states and partly by the municipalities. The right to regulate is clear and the necessity for doing so is undisputed, so that the practice within the past few years, and especially just at the present time, is becoming very common.

Under a statute providing for the taxing of motor vehicles operating for hire on the public highways and carrying passengers or freight as a matter of business, motor vehicles carrying mail only may properly be exempted from the provisions of such regulation, for as the court said in the case of *State v. Johnson*, 75 Mont. 240, 243 Pac. 1073: "He is not entitled to the privilege as a matter of right, and, if he would accept, he must do so subject to the conditions attached to the offer. * * * It is clearly the express intention of the legislature to include within the prohibition of the act every person operating a vehicle of the nature described for hire and as a regular business, on a commercial basis, between fixed termini, and to exclude from its operation those residing in rural communities who may occasionally carry either passengers or freight, with or without compensation, but not 'on a commercial basis,' and not as a regular business. As to this exemption, no doubt those persons included in the exemption would not be subject to the provisions of the act had the legislature been silent on the subject. Having spoken, no discretion as to those persons is lodged in the commission. * * * It is well settled that, in the exercise of the police power of the state, exemptions may be made even of classes which, except for the exemption, might fall within the purview of the statute, provided such exemption is reasonable and applies equally to all persons or subjects within the class designated. * * * The complete answer to this contention is that the transportation of passengers or freight for hire is an independent business having nothing to do with the carriage of the mail, and the regulation

and control of the former can not in any manner interfere with the transportation of the mail. All that was necessary in order that defendant might escape liability under this act was for him to proceed with his mail route and refuse to accept passengers for transportation for hire, as his contract for carrying the mail does not come within the definition of either passengers or freight. * * * Owing to the diversity of vehicles to be used and their divergent effect upon the surface of the highways to the amount of business transacted varying in each instance, justice and fair dealing require a more or less elastic scale of fees to be charged for the privilege of conducting such business, and this detail can best be handled by a board or commission so situate that it can inquire into the circumstances of each applicant. Any attempt on the part of the legislature to meet all conditions which might arise would, of necessity, result in regulation which would be 'arbitrary, unscientific, and unfair.' In the absence of any showing to the contrary, the license fees required, as fixed by the act, and the rules, regulations, or requirements of the commission, must be presumed to be reasonable. * * * However, the definition of 'motor vehicle' includes 'any self-propelled vehicle moving over the highway of this state,' with certain exceptions, and should be readily understood and construed, except as to the proviso that 'every motor vehicle equipped with more than four wheels shall be declared to be a motor vehicle used in connection with a trailer or subtrailer.' We will agree with the trial judge that this proviso is incapable of accurate construction. It was probably included out of an abundance of caution to prevent the evasion of the law by the attachment to a four-wheeled car of some sort of permanent fixture supported by one or more wheels. But, as the act applies to all motor cars, trucks, or buses, except those exempted, whether operated as a single conveyance or with a trailer or subtrailer attached, it is immaterial what, if any, meaning the proviso has."

The necessity for the regulation of motor vehicles operating for hire over the state highways is indicated where the condition of the highways would not permit the giving of such service, when the court decided that this constituted a sufficient excuse for a failure to render the service, so that a revocation of the certificate for such failure was unreasonable and invalid, for as the court said in the case of Zanesville, Caldwell &c. Transp. Co. v. Public Utilities Comm., 119 Ohio St. 318, 164 N. E. 230: "It was testified, in substance, that it would be impossible to make regular schedule time on this route; that, while a passenger car

might at some time get through, a truck would not be able, carrying freight, to make the trip, and that the clay roads in that vicinity, over some of which this route runs, are practically impassable from November to May. No testimony to the contrary was adduced. Cessation of operation can not be ignored when deliberately done without lawful justification; but failure to operate when roads are actually and concededly impassable, and when the situation is explained to the commission and applications are made to operate over the only passable part of the road, can not be regarded as a violation of the statute, nor, hence, as 'good cause' for revocation of the certificate. Under the facts of this particular record, we are compelled to reverse the order of the public utilities commission."

A statute levying a tax for the use of state highways by motor vehicles operating thereon for hire will be sustained, unless it is flagrantly unreasonable in its amount; and in determining the reasonableness of the tax for the privilege granted, the cost of constructing and maintaining the highways being used should be considered the basis for computing the tax, which should also be fixed with reference to the weight of the load carried, and a comparison of the tax with the cost of competing systems in constructing and maintaining their rights-of-way may also be properly taken into account, for as the court said in the case of *State v. Railroad Commission*, 196 Wis. 410, 220 N. W. 390: "Conceding the power to levy the tax, the question of the amount of the tax is one primarily for the legislature. The court can not interfere with the action of the legislature unless it clearly appears that the amount fixed is so flagrantly unreasonable, unjust, and oppressive that the courts can find that it destroys or unreasonably hampers a legitimate business or occupation. A consideration of the facts established on the trial leads to the conclusion that the relator has not met the burden imposed upon it. Most of the mileage of the highways over which relator operates its trucks is paved with concrete. It has cost in excess of \$5,300,000 to construct the highways used by relator. Basing an annual depreciation charge on the assumption that these highways will have a useful life of twenty-five years, and adding thereto the maintenance cost, we have an annual charge in excess of \$280,000 against the highways on which relator operates its trucks. The tax paid by relator each year for the use of all these highways would construct less than one-half mile of concrete paved highway such as the state supplies to the relator over which to con-

duct its business for gain. The tax imposed on relator's large trucks amounts to six and two-fifths cents for each mile traveled. On its smaller trucks the tax amounts to four and two-fifths cents a mile. This can not be said to constitute an excessive charge for the facilities supplied to the relator. The proof shows that it cost interurbans, with whom the relator competes, seven-tenths cent per ton mile to maintain its ways and structures which correspond to the highways supplied by the state over which relator conducts its business. The actual cost per ton mile for the ways and structures over which the interurban operates its cars is approximately twice what the state charges the relator for supplying the ways and structures over which it conducts its business. * * * The fact that the law requires trucks to pay a ton mile tax that is double that imposed upon buses does not amount to such an unreasonable discrimination as to render this statute void. The ton mile tax in the case of both buses and trucks is based upon the load that would be carried if they were always loaded to capacity. The proof establishes the fact that buses operate with an average load of twenty-nine per cent of capacity, while the average load of the trucks is seventy-five per cent of capacity. These trucks are heavier and do greater damage to the highway. They should therefore make a larger contribution for the use of the highway. * * * The ton mile tax does not impose an unlawful burden on interstate commerce. Carriers who use the highways of a state in carrying on interstate commerce 'may be required to contribute to their cost and upkeep.' * * * It can not be said that an aggregate annual charge which is less than the cost of supplying itself with one-half mile of concrete roadway bears no reasonable relation to the privilege granted, where the state supplies relator with approximately 150 miles of hard-surfaced roads."

Under the general rule that motor vehicles operating as common carriers are subject to the regulation and control of the public utilities commission, they may not avoid such regulation by special contracts, for where they are actually engaged in carrying on such a business they are subject to regulation, for as the court said in *Public Utilities Comm. v. Boughtonville Farmers Exchange*, 40 Ohio App. 395, 178 N. E. 859: "The plaintiff, the public utilities commission of Ohio, seeks to enjoin the defendants from operating a truck as a common carrier without procuring a certificate of public convenience and necessity, as required by section 614-84 et seq., General Code. One who operates a truck or trucks upon the highways for compensation, and

holds himself out to the public as being willing to serve the public indiscriminately to the limit of the capacity of his truck or trucks, is a common carrier. * * * The method of doing business in the instant case, however, amounted to nothing more or less than a plan of transporting livestock for the public in that vicinity at a charge of sixty cents per hundred. It was merely a device which enabled the truck owners to carry on the work of a common carrier through the defendant company. If such a device could be used to evade the law, all truck owners engaged in transporting goods to market as common carriers could operate under special contract with another person, or a corporation, and avoid the legal necessity of obtaining a certificate of public convenience and necessity."

A nonresident whose own state does not require licenses permitting the operation of motor vehicles may not complain because another state exempts nonresidents from securing local licenses where they possess a license from their own state, because any state may require a license even of nonresidents, and the fact that it exempts some who have secured licenses from their own state does not require that the exemption be extended to residents of states requiring no such licenses, as is indicated in the case of *State v. Chandler* (Maine), 161 Atl. 148, where the court said: "The respondent maintains that this license regulation denies to him, as a resident of Florida which permits motor vehicles to be operated on its highways without a license, privileges which are accorded to the residents of many states, outside of Maine, which have this requirement. This he charges is a denial of the equal protection of the laws guaranteed to him by the Fourteenth Amendment to the Constitution of the United States. The right of a state in the exercise of its police power to prescribe uniform regulations necessary for public safety and order in respect to the operation of motor vehicles on its highways has been repeatedly recognized and sustained. * * * The fees charged for licenses, so far as here appears, are reasonable and properly appropriated. If the legislature had seen fit, it could have rightfully extended this license requirement to all nonresidents and granted the exemption to none. The absence of such a provision in favor of nonresidents would not render the law discriminatory. *Kane v. New Jersey*, 242 U. S. 160, 61 L. ed. 222, 37 Sup. Ct. 30, supra; *Storaasli v. Minnesota*, 283 U. S. 57, 51 Sup. Ct. 354, 356, 75 L. ed. 839. No more, in our opinion, does the inclusion of a grant of exemption only to those having licenses from the states of their residence."

That the state has the undoubted power to regulate motor vehicle traffic on its highways when operating for hire is well expressed as follows in the case of *Ford v. Tyson* (Tex. Civ. App.), 43 S. W. (2d) 619: "The right of the state to control by legislation the highways is now well settled. * * * Under the statute in controversy the legislature (Acts 42d Leg. [1931] chapter 277, section 21 [Vernon's Ann. Civ. St., article 911b, section 22b]), in stating the policy of the state relative to the highways, said: 'The business of operating as a motor carrier of property for hire along the highways of this state is declared to be a business affected with the public interest. The rapid increase of motor carrier traffic, and the fact that under existing law many motor trucks are not effectively regulated, have increased the dangers and hazards on public highways and make it imperative that more stringent regulation should be employed, to the end that the highways may be rendered safer for the use of the general public.'"

In determining the capacity of motor vehicles operating on the public highways, the manufacturers' rating is generally accepted as the standard method, and where this has been used for a number of years as a departmental construction of this provision of the statute, the court will sustain it as the proper interpretation of the legislative intention, for as the court said in the case of *State v. H. M. Hobbie Grocery Co.* (Ala.), 142 So. 46: "Appellee's view is that the manufacturers' rated capacity, known to the trade and public generally, is the proper basis of the tag tax. This, it is admitted, has been the construction uniformly given by the state tax commission, and other administrative agencies of the state, in collecting the tax and issuing tags. * * * So, for twelve years, the uniform construction of this statute by the administrative department has been to fix the license tax on the vehicle itself, designated by its tonnage classification well known among users of trucks. Meantime, the legislature has twice reenacted the classification in precisely the same terms. The administrative construction of this statute has not been casual, occasional, or incidental; but has been of daily statewide application in the execution of the law by all the agencies charged with duty in that regard. The state's revenue from this registration, license, or tag tax is substantial, and the constant subject of legislative attention. Under these conditions, the reenactment of the statute without change may be treated as a legislative approval of the departmental construction of the stat-

ute, quite as persuasive as the reenactment of a statute, which has been judicially construed. * * * The graduated tax based on tonnage capacity carries into effect the principle insisted upon. This is a practical workable basis. It would be difficult to administer a law that calls upon the licensee to stipulate the maximum load he proposes to haul, and, if found loading in excess of such amount under any conditions, call upon him for a new license tax. This seems to be the construction upon which this action is based."

The appellate court of Alabama in a later decision, construing this same statutory provision, reiterated the previous opinion and held that such an interpretation of the provision furnished a fixed standard for the purpose, the same as the standard of horse-power is fixed by the manufacturer for pleasure or passenger automobiles. In adopting this definite measure of capacity, the courts will not attempt to determine the actual weight of the load or concern itself with matters of overloading after the license has been issued, as is indicated in the case of *Waters v. State* (Ala. App.), 142 So. 113, where the court said: "It is admitted that the defendant paid the license and received the tags for the truck and trailer based upon the rating, according to standards and usages as fixed by the manufacturers of said truck and then prevailing in the county and state, but it is claimed by the state that, after paying such license and receiving and attaching the tags as required by the statute, the defendant hauled on said truck loads of lumber weighing more than the standard capacity, to wit, 4,500 pounds. * * * It is very obvious that, in issuing licenses and tags for automobiles and trucks, some fixed standard must be adopted to prevent endless confusion. In dealing with pleasure cars, the standard is the horse-power as fixed by the manufacturer. For motor trucks the license is fixed upon carrying capacity. According to this evidence, the generally accepted capacity recognized by citizens and officers alike is that fixed by the manufacturers of the trucks. That is the standard for the issuance of licenses and tags. When a person has complied with that standard in obtaining a license and tag, he is at liberty to operate his truck on the public roads of this state. That he overloads his truck does not render him liable for another license."

Under its power of regulating motor vehicles operating for hire over its highways the state may limit the length of such motor vehicles as well as their load, whether operating singly or

in combination, and in doing so it may classify motor vehicles carrying freight and those carrying passengers and permit a greater weight for the latter than for the former class, because the number of such motor vehicles carrying freight far exceeds those that carry passengers and the average load weight of passenger-carrying vehicles is less than those carrying freight. This classification is also permitted for the further reason that it tends to encourage intercourse for business, educational, and social purposes, so that in many cases the load weight of motor vehicles transporting persons is unlimited. This distinction and principle are recognized and discussed as follows in the case of *Sproles v. Binford*, 56 Fed. (2d) 189: "The Texas courts have not construed section 7 (section 5 [b]). Looking to the act to discover the legislative intent, we find that the measure is declared to be (section 15) for the benefit of public safety and the protection of the highways. It would be most unreasonable to suppose that the legislature, with this purpose in mind, intended to permit regularly to pass over the highways, under the circumstances set forth in section 7 (section 5 [b]), or, indeed, under any circumstances, combinations of vehicles, without limit as to number of vehicles in the combination, and/or the length of the combinations, with each vehicle in the combination carrying 14,000 pounds. We think the reasonable construction, and that intended by the legislature, is that a combination of vehicles under such section 7 (section 5 [b]) is limited to a maximum of fifty-five feet in length, and the load or loads to a maximum of 14,000 pounds. * * * Complainant and interveners complain of the provisions in section 5 (Vernon's Ann. P. C. Tex. article 827a, section 5), limiting loads to 7,000 pounds. The right of the legislature to regulate and limit the gross weight of vehicles, and the loads thereon, passing over the highways, is beyond question. *Morris v. Duby*, 274 U. S. 139, 47 Sup. Ct. 548, 71 L. ed. 967, and authorities there cited. The legislature saw fit to limit such gross weight of vehicle and load by limiting the load weight. This, and the limitation of such load weight to 7,000 pounds, is complained of, and we are asked to substitute our judgment as to the manner of limiting such gross weight of vehicle and load, and our judgment as to limitation of load weight, for that of the legislature. This we may not do. * * * The legislature must be presumed to have found as a fact that the limitation of the weight of the load would serve to limit the gross weight of load and vehicle, and the preponderance of the evidence before us supports this finding. The legislature must

also be presumed to have found as a fact that 7,000 pounds load weight, plus the weight of the vehicle, is the maximum load that should be allowed to pass over the highways, taking into consideration the manner of past and present road construction, planned future construction, cost of maintenance, strength of the bridges, conditions of traffic, etc. The preponderance of the evidence before us confirms this finding. * * * It is contended and shown that the combined weight of vehicles and load carrying persons as passengers, for hire, is greater than will be the combined weight of vehicles and load carrying freight, for hire, where the weight load is limited to 7,000 pounds, and that the damage to the highways is as great from a load of persons as a load of freight; and it is contended that the dangers to persons and property on the highways are as great from a load of persons as from a load of freight. * * * It is shown that the number of vehicles transporting freight for hire on the highways very greatly exceeds the number of vehicles transporting persons for hire thereon, and it is also true that the average load weight of private vehicles transporting persons on the highways is much less than 7,000 pounds, and that the average weight of private vehicles transporting persons on the highways is less than the average weight of vehicles transporting freight for hire. The intercourse between the people of the state, and between them and the people of other states, for business, educational, and social purposes, is largely dependent upon the safe, rapid, and dependable transportation of persons, and the legislature may well have determined and decided, as they seem to have done, that the transportation of persons upon the highways should be favored over, and as against, the transportation of freight, and that, while the transportation of persons for hire and the transportation of persons in private cars should be regulated, as provided by existing law, there should be no regulation of the load weight as in the transportation of freight. The legislature may have determined, and doubtless did, that, since the number of vehicles transporting persons for hire is so greatly less than those transporting freight for hire, the purposes of the act, i. e., highway and traffic protection, would be met by limiting only the load weight of vehicles carrying freight. That the legislature may lawfully do this we have no doubt."

In regulating motor vehicles operating over its highways, the state may classify them as common and private carriers and exempt the business of the latter from regulation, because their

use of the highways is only incidental to their regular business, as is indicated in the case of *Ogden & Moffett Co. v. Michigan Public Utilities Comm.*, 58 Fed. (2d) 832, where the court spoke as follows: "Plaintiffs, a group of private or contract highway carriers by truck, seek to enjoin the execution of Act No. 212 of the Michigan Public Acts of 1931, in so far as it requires them to obtain permits from and conform to the rules and regulations of the public utilities commission. * * * The act does not undertake to regulate the business of private carriers, but only to regulate their operations upon the highways. In this respect, it carefully differentiates between public and private carriers; and the intent not to regulate generally the business of the latter is emphasized by the complementary Act No. 312. There is by the act no unlawful delegation of legislative authority, and it is not alleged that any oppressive, arbitrary, or unduly burdensome rule or regulation has yet been made; nor has there been any attempt to examine plaintiff's books and records, under section 15. We can not say that there was no substantial basis for separately classifying the contract-carrier, who is burdened, and the owner-carrier, who is not. There are doubtless instances where the public safety requires regulation and control of some owner-carriers as much or more than of some contract-carriers; but, as classes, those who make the use of the highways the basis of their business, and those who use the highways only incidentally to their main business, may well be thought to require variant treatment in the matter of highway use and regulation. A review of the pertinent decisions would not now be helpful. We conclude that the act is valid and that the motion for a preliminary injunction should be denied and the restraining order dissolved."

§ 757. **Regulation by public utilities commissions.**—The policy of determining the extent and form of such regulation is a matter of opinion and the various forms and different degrees of regulation now in vogue indicate the wide diversity of opinion on the subject, and the unsettled and uncertain attitude of the authorities in many jurisdictions is ample evidence of the fact that the subject is still an open one and that its proper solution will require much serious consideration. Already in most of the states this regulation is vested in the public utilities commissions and this seems to be the tendency in practically all jurisdictions, subject to more or less local regulation.

While motor vehicles operating over state highways for hire are properly subject to regulation by the state through its commission, statutory authority for this purpose is necessary, as is indicated by the case of *In re James*, 99 Vt. 265, 132 Atl. 40, where the court said: "The petitioner was operating motor buses over a portion of the route covered by the trolley line, using for that purpose the public highways, with no excuse for so doing, so far as the general good of the state was concerned, and the commission was powerless to interfere under the law as it stood prior to the enactment of Act No. 74."

Public utilities commissions have the power to revoke certificates for violations of the rules and conditions upon which they were issued, as a means of enforcing their orders and regulations, and unless their actions in doing so are arbitrary or unreasonable, they will be sustained by the courts, for as the court said in the case of *Detroit-Cincinnati Coach Line, Inc. v. Public Utilities Comm.*, 119 Ohio St. 324, 164 N. E. 356, P. U. R. 1929B, 335: "It is not claimed that the charges and regulations are unreasonable or burdensome. The issue tried before the commission was whether or not the operator is disobeying and disregarding them altogether. This is an issue of fact which the commission has decided, and the findings of the commission are sustained by the evidence. The commission has found that the operator has flagrantly violated the laws of the state and the regulatory rules of the commission." * * * "The persons operating motor vehicles upon state highways as common carriers in interstate commerce are guarantied against unreasonable interference and unreasonable burdens, but this immunity does not justify such persons in becoming outlaws or abusing franchises thus given to them. We are of the opinion that the right of revocation and prohibition is necessary to the maintenance of a proper respect for state laws and state institutions."

This same court in a later case sustained the action of the commission in revoking a certificate for violation of the rules of the commission and the conditions of the certificate, although the certificate covered interstate as well as intrastate commerce, saying in *Wheeling Traction Co. v. Public Utilities Comm.*, 119 Ohio St. 481, 164 N. E. 523: "The record in each instance discloses that the violations were so frequent and so patent that the drivers must have intended to violate the rules of the commission and the conditions of the certificates, and they were so long continued that the owner of the certificates must be held to have

had knowledge of them. * * * We are of the opinion that the commission did not err in revoking the interstate certificate. This court held on the twelfth day of December, 1928 (*Detroit-Cincinnati Coach Line, Inc. v. Public Utilities Commission*, 119 Ohio St. 324, 164 N. E. 356), that the commission has the power to revoke an interstate certificate for flagrant violations of valid rules and conditions. * * * It would be an anomalous situation if this court should hold that the commission might revoke an interstate certificate while at the same time leaving in full force and effect an intrastate certificate covering the same route and involving substantially the same violations."

This same court in a still later case sustained the action of the commission, requiring motor vehicles operating for hire to desist from doing so, because the order of the commission was void from a failure to comply with the statutory requirements, and was, therefore, void from the beginning, for as the court said in the case of *Ohio Transit Co. v. Public Utilities Comm.*, 119 Ohio St. 527, 164 N. E. 762: "All subsequent increases in equipment after the granting upon affidavit of the certificate of public convenience and necessity were illegal and the orders issued by the commission with respect thereto were void. * * * An order of the public utilities commission to desist from operating equipment authorized under a previous order, which previous order is void because of noncompliance with jurisdictional statutory requirements does not constitute an alteration, amendment, or revocation of the certificate within the purview of section 614-87. * * * As the void order of October 20, 1927, emanated from the commission itself, it might have been wise practice for the commission to grant a hearing before issuing the order complained of herein. However, since the order authorizing the extra equipment was void ab initio, it was as if it had never been, and the public utilities commission was justified in issuing a summary order to desist from the illegal operation."

While the commission may revoke certificates for the failure of companies to provide insurance as required by the rules and regulations of the commission as well as the statute, this can only be done after giving the company a hearing on due notice, for as the court said in the case of *Minerva-Canton Transit Co. v. Public Utilities Comm.*, 118 Ohio St. 561, 162 N. E. 34, P. U. R. 1928E, 130: "Like power and authority have been conferred upon the commission to supervise and regulate the service and require and enforce conformance to the law, and to its own rules prescribed under authority of law, for the purpose of protecting and safe-

guarding the interests of the public. The default of the company in respect to insurance covered a considerable period of time, and is inexcusable. It was not only in disregard of the rules and regulations of the commission, but in direct violation of the law. Section 614-99, General Code. Power, full and complete, is conferred upon the commission to revoke any certificate upon good cause, after prescribed notice and an opportunity to be heard."

That an order of the commission requiring a company to desist from using increased equipment, not authorized by the commission, will be sustained as within their power in the same way and for the same reason as where a company is operating without an original order to do so, is indicated in the case of Central Ohio Transit Co. v. Public Utilities Comm., 119 Ohio St. 531, 164 N. E. 763, P. U. R. 1929C, 326: "In this case the commission ordered the Central Ohio Transit Company to desist from operating any buses except the seven-passenger buses which the original operators were actually operating on April 28, 1923. This order was entirely proper. The statutory provisions as to application, notice, and hearing apply to increases of equipment as well as to original applications to operate. Columbus Ry. Power & Light Co. v. Public Utilities Commission, 113 Ohio St. 634, 150 N. E. 237. An increase permitted by the commission without compliance with these statutory requirements is void."

A regulation by the state commission providing for separate apartments or separate motor vehicles operating as common carriers for the accommodation of the white and negro races will be sustained as being for the public benefit and welfare, for as the court said in the case of Corporation Commission v. Transportation Committee, 198 N. Car. 151, 151 S. E. 648: "As to separate apartments in the buses or separate buses run for the accommodation of the white and negro races, this is a matter for the corporation commission to determine, taking into consideration the terminals of the lines, population, economical conditions. The matter should be worked out in good faith by the corporation commission, taking all things into consideration, for the best welfare of the white and negro races, so that justice can be accomplished in this racial condition that exists among us—a duty that the state owes to all its citizens. Chapter 136, Public Laws 1927, especially section 7 of said act. * * * 'That it had been decided by this court, so that the question could no longer be considered an open one, that it was not an infraction of the Fourteenth Amendment for a state to require separate, but equal, accommodations for the two races.'"

The action of the public utilities commission will be sustained where the evidence shows that it is reasonable and supported by statutory authority, for as the court said in the case of *Buckeye Stages, Inc. v. Public Utilities Comm.*, 124 Ohio St. 148, 177 N. E. 209: "The commission has found that the extension of route granted to the Chillicothe-Hillsboro Stages, Inc., is required by public convenience and necessity. This finding is amply sustained by the evidence. The question which confronts us, hence, is not that of the extension of a certificate where the public convenience and necessity does not require the extension. Since upon hearing it is shown that the instant order will safeguard essential transportation service between Hillsboro and Chillicothe, where the operation of the Chillicothe-Hillsboro Stages, Inc., is the only transportation service, and will also establish this new service between Vera Cruz and Milford via Newtonsville, required by the public convenience and necessity, the commission has not exceeded its powers."

The commission may determine as a question of fact whether, under proper statutory authority, a motor vehicle operating over the state highways is a common carrier, and their determination of the question will be sustained by the courts, unless the evidence fails to support the finding, for as the court said in the case of *Sheets v. Public Utilities Comm.*, 124 Ohio St. 343, 178 N. E. 416: "Whether or not the respondent is a motor transportation company is declared by section 614-84, General Code, to be a question of fact to be found by the commission. The legal principles to guide that determination have been declared by this court in *Craig v. Public Utilities Commission*, 115 Ohio St. 512, 154 N. E. 795, and in *Breuer v. Public Utilities Commission*, 118 Ohio St. 95, 160 N. E. 623. In those cases the rule as to what constitutes a common carrier is declared, and it is further declared to be a question of fact whether one charged as a common carrier comes within these rules. Applying the tests of those cases, we find that the conclusions reached by the commission were not manifestly against the weight of the evidence."

This same court in a later opinion reaffirmed its decision and sustained the action of the commission in determining that a particular motor vehicle was using the public highways as a common carrier, and, as the territory in question was already served, the commission was justified in denying this carrier a certificate of convenience and necessity, for as the court said in *Larkin v. Public Utilities Comm.*, 124 Ohio St. 302, 180

N. E. 54: "Daniel C. Larkin is engaged in the business both of transporting property and of providing or furnishing such transportation. It is conceded that he does this for hire, in motor-propelled vehicles over the highways of the state, and the only serious question remaining for disposition is whether he does this for the public in general. * * * This case presents a question of fact. Under the case of *C. Sheets & Sons v. Public Utilities Commission*, 124 Ohio St. 343, 178 N. E. 416, 417, a similar operation was found by this court to constitute a common carrier operation. * * * Under the authority of the *Sheets* case, bearing in mind the amendment to the statute, we hold that the commission's ruling that the operation constitutes a common carrier operation is not unreasonable or unlawful, and affirms the commission upon that point. * * * Hence we are compelled to affirm the order of the public utilities commission upon the ground that the territory applied for is already amply served."

§ 758. **Municipal regulation and control.**—The power of municipal corporations to regulate motor vehicles operating for hire upon their streets is generally recognized. Inherently in the exercise of the police power municipalities may make reasonable traffic regulations for the safety of their citizens and to facilitate transportation and to accommodate the transaction of business to the congested conditions which are now common to urban life. This is an early and well-recognized subject of local control, but the statutory authority vested in municipalities for the regulation of motor vehicles operating public transportation systems is far from uniform and few states have adopted identically the same plan. While some cities have only the merest power to regulate traffic as a matter of safety in the absence of express statutory authority and in the exercise of their own police power, others having home rule charters exercise and enjoy the highest possible power of local control over all transportation systems operating for hire upon their streets.

The right of municipal corporations to license motor vehicles operating for hire over their streets annually, and to require the payment of a full year's fee for the privilege, is generally recognized as being a proper exercise of the police power, for as the court said in the case of *Northern Kentucky Transp. Co. v. Bellevue*, 215 Ky. 514, 285 S. W. 241: "It can not be said that the license fees set out in the ordinance are unreasonable or amount

to a denial of the right of appellant to engage in the occupation of carrying passengers for hire. The contention of appellant that the ordinance is invalid because it provides that licenses shall expire on December 31 of the year for which issued and no less than a full year's license fee shall be paid is likewise untenable. * * * The right of a state or municipality to regulate the use of its highways and to impose a license fee for the use thereof is recognized by the courts on the ground that such regulation and licensing are proper exercises of its police power, and, further, that it has a right to exact a reasonable compensation for the use of its highways."

That a municipality may regulate or exclude the operation of motor vehicles over particular streets in the interest of the public safety under its police power is established in the case of *Peoples Rapid Transit Co. v. Atlantic City*, 105 N. J. L. 286, 144 Atl. 630: "It is settled in this state that the regulation of motor vehicles on particular streets, even to their complete exclusion therefrom when deemed necessary in the public interest, is within the police power delegated to municipalities."

Under home-rule municipal charters, municipalities may regulate in considerable detail and grant franchises under which annual payments of a part of the gross receipts and other fees may be required of motor vehicles operating as common carriers over their streets in order to raise funds for the cost of regulation and as contributions to the maintenance of their streets. This principle is established and discussed as follows in the case of *Wichita Falls Traction Co. v. Raley* (Tex. Civ. App.), 17 S. W. (2d) 157, where the court said: "That about the year 1913 said city duly adopted a special charter under what is known as the 'Home-Rule Amendment' to the Constitution (article 11, section 5), and has since that time operated thereunder. In 1909 the appellant traction company constructed a complete line of electric railway through the city of Wichita Falls, and since that time has continuously operated same, maintaining a regular service under the provisions of a franchise granted to them by the city of Wichita Falls in 1909 and amendments thereto. * * * Pursuant to said law, in 1927, plaintiff commenced to operate, wholly within the corporate limits of the city of Wichita Falls, certain passenger buses, which were so operated in connection with the electric car system and as a part thereof for the purpose of furnishing the citizens of Wichita Falls, particularly the people of small means and the school children residing therein, at a small charge,

efficient and regular modes of transportation to and from and between their respective homes, places of business, workshops, schools, and colleges. * * * That pursuant to the provisions of said article 6548, the traction company, before starting to operate, as a part of its street car system, motor-propelled passenger buses, applied to the governing body of the city of Wichita Falls for a franchise authorizing it to operate said buses over, along, and across the streets and alleys within the city; and after due notice, publication, and hearing, the city of Wichita Falls, through its governing body, did, on the fourteenth day of December, 1925, duly enact its Ordinance No. 656. * * * Section No. 4 of the ordinance provides that the traction company shall pay to the city, and it has so paid, the sum of ten dollars each year for each and every street bus operating, and in addition thereto one per cent of the gross receipts from all street buses so operated. The traction company has complied with all terms, provisions, and conditions of said ordinance. * * * The fees and other sums imposed upon appellant by the city of Wichita Falls being intended for and applied to the maintenance of its own streets and roadways."

Municipalities have in most cases the power to regulate motor vehicle traffic for hire upon its streets, and in doing so may require them to provide bonds for the protection of persons and property injured through their negligence, as is indicated in the case of *Transylvania Casualty Ins. Co. v. Atlanta*, 35 Ga. App. 681, 134 S. E. 632, where the court said: "While a municipality is limited to the exercise of such powers as are expressly conferred by statute, or as may be implied as necessarily incident thereto, still, in the exercise of such implied powers, it has the right to adopt all ordinary or usual means which may be necessary to their full execution. The regulation and control of jitney bus traffic coming clearly within the powers of the municipality, the ordinance requiring the operators of such buses to furnish to the city a bond for the protection of persons who might be injured in the conduct of such business was the exercise of an ordinary and necessary means of regulating such traffic, and the right of the city to sue upon such a valid obligation, according to its express terms and provisions, follows as a necessary consequence."

§ 759. Municipal and state control.—The control of municipalities over motor vehicle traffic, when conducted for the use and benefit of the public for hire, is fixed and defined very largely

by express statutory provisions and varies widely in the different states, and often within the same state special charters or statutory laws are applicable to particular cities. The general authority, however, of a municipal corporation to regulate or even to prohibit the use of its streets for the purpose of conducting thereon any kind of business can not be denied. The right to such use can only be acquired by the grant of a license or permit from the particular city. In many, if not in most cases, there is found a dual control—the state issuing the permit or certificate of convenience and necessity, if conditions justify, which may be exercised and enjoyed only after the city grants its consent to the use of its streets. “Public convenience and necessity” exists when the proposed facility will meet a reasonable want of the public and supply a need which the existing facilities do not adequately afford. It does not mean or require an actual physical necessity or an indispensable thing.

While municipalities only have such powers as the statutes provide or as may be fairly implied from their provisions, generally speaking, they may regulate, and, in some jurisdictions, require licenses from motor vehicles operating over their streets, as is indicated in the case of *Combs v. Bluefield*, 97 W. Va. 395, 125 S. E. 239, where the court said: “In the instant case no complaint is made that the penalties imposed by the city differ from those prescribed by the statute. The sole question is whether the city may require resident owners of motor vehicles to obtain licenses. We hold it may.”

While the general public is entitled to the free use of streets and highways, their use as a place of business may be regulated and a reasonable charge made for such regulation and use. The fact that the state has acted in the matter does not necessarily preclude action by the municipality, although of course exclusive state regulation would bar local regulation, for as the court said in the case of *Towns v. Sioux City (Iowa)*, 241 N. W. 658: “It has been well settled that no person has the inherent right to use the public highways of the state as a place of business. In other words, the general public is entitled to the free use of the highways, but this right and privilege does not include the right to use such public highways as a place for private business. The state undoubtedly has the right and in many instances has prohibited the use of the highways and streets as a place for private business. The charge for the rights conferred by the permit provided for in chapter 252-C1 of the Code is therefore a charge for the privilege or right to do business on the public

highways of the state under certain conditions and limitations, and is therefore purely and simply a privilege or occupation tax and not a license in the ordinary sense and use of that term.

* * * The conclusion we reach, therefore, is that there is no conflict between the powers exercised in enacting said ordinance and those given the railroad commission under chapter 262-CI of the Code. It is urged in addition that the ordinance is unreasonable and excessive in amount, and therefore amounts to a taxing measure instead of the exercising of the power of license. It is quite well settled that, when an ordinance of this kind is passed by a municipality under a grant of power, the fee fixed by the municipality is reasonable unless the contrary appears from the ordinance itself or is shown by proper evidence. * * * We see nothing on the face of this ordinance which indicates that the license fee is unreasonable, and there is not sufficient evidence before us to warrant our saying that the same is so unreasonable that it should be held to be a tax measure instead of a license measure."

§ 760. **Basis of control coextensive with motor system.**—The matter of local regulation and control of motor vehicle transportation in serving the public generally should be limited to such systems as operate locally and to matters of traffic regulation and the like as to other systems operating within and beyond the particular city. This control should be exercised by an agency whose jurisdiction is as broad as the system of transportation under regulation and should embrace all general questions affecting the system in order to secure uniformity of operating conditions and to avoid special restrictions which would interfere with the general operating policy of the entire system extending beyond the particular local regulating agency. In the main a policy of statewide regulation of these as of other utilities simplifies the matter of control and secures greater uniformity of operating conditions.

§ 761. **Jitneys as common carriers.**—The advent of the jitney created an entirely new condition of local transportation and gave rise to many novel and perplexing questions of local control. This means of transportation constitutes an entirely new and different form of common carrier and it may be so classified for regulation. Jitneys whether operating within or between municipalities constitute an extraordinary use of the streets and highways and their operation, being a privilege and not a right, is

subject to regulation and control by the state directly or by the municipality acting under authority of the state. Their operation in the streets and highways as common carriers for profit is a special use, which tends to obstruct traffic, and this use with the consequent wear and tear on public thoroughfares is a proper subject for regulation. The entering of the jitney into the field necessitated special regulation, and in the meantime many cities have passed ordinances for that purpose, and their right to do so has been uniformly upheld. Aside from the reasonableness of the provisions of such ordinances the right to classify jitneys and to regulate them as a special class is recognized in all jurisdictions.

§ 762. *Jitneys compared to street cars.*—The reason for distinguishing between a street car system, operating on permanent steel tracks under a special franchise, which requires making large permanent investments, and a Ford touring car, operated as a jitney bus, is quite obvious, and is amply sufficient to justify classifying and regulating jitneys as a special and separate form of common carrier. The jitney business for transporting people for hire over definite routes at a uniform five or ten-cent fare in low-priced or second-hand automobiles brought about attempts at its regulation almost immediately, in some instances by the states themselves and by city ordinances in many other cases. While the form of regulation has varied widely the fact of the right and necessity for such regulation was recognized on all sides.

§ 763. *Reasons for special regulation.*—Special provisions to secure safety and uniformity of service and to coordinate new systems with existing systems of transportation have always been upheld. Conducting such a business in the streets of our cities is a special privilege rather than an absolute right and it is properly granted subject to conditions and only on the issue of a license or permit. The tendency in conducting such a business is generally to invest in cheap or second-hand machines which often are of fragile construction and many of which are not owned outright but are operated subject to liens or leases. Because of the small carrying capacity of each car the number necessary to accommodate any considerable population greatly increases the congestion in the streets and, having no fixed tracks or means to move upon but stopping and starting anywhere along the entire street, creates new traffic conditions and requires special regulation.

§ 764. **Jitneys and taxicabs.**—Jitneys are properly distinguished from taxicabs which operate from fixed stations where passengers are received or directions given for reaching them and which carry their fares over any street to a certain destination, and these different forms of service justify the imposition of different conditions from those properly applicable to the taxicab or street railway system. The street car system involves a fixed plant and rolling stock and thus represents a large permanent investment which in itself constitutes an indemnity against any liability due to negligence. The motor vehicle line has no fixed stations or roadbed and only a comparatively small investment which is generally temporary, requiring frequent renewals and additions. As compared to taxicabs, jitneys operate over fixed routes accepting passengers wherever they appear and discharging them wherever they desire. Not so with taxicabs, for their schedules and routes are not fixed but are determined in each case by the service desired by the passenger. Their fees are larger and the cars not so numerous and they do not serve the general public. They avoid congested districts and are generally conducted by responsible companies.

§ 765. **Operation of jitneys in streets for profit.**—Jitneys naturally seek to operate in the midst of crowded streets and congested areas in seeking their fares while taxicabs having secured their passengers choose the less crowded streets and most direct route to their destination in order to facilitate their service. A large number of jitney buses driving rapidly along congested streets and stopping wherever hailed to receive and discharge passengers naturally tend seriously to obstruct traffic and interfere with the ordinary and proper use of the streets as avenues of transportation. By virtue of its low fare and the manner of its operation the jitney covers very much the same field as the street car system. By moving rapidly and indiscriminately over the streets in seeking passengers in competition with street cars and other jitneys, this form of transportation creates a special menace to the passengers and especially to the public at large which is much greater than the ordinary private automobile, taxicab, or street car.

§ 766. **Municipal regulation of jitneys.**⁹—In the absence of express statutory authority in the matter, municipal ordinances on this subject have generally been sustained when based on gen-

⁹ This section of third edition cited in *Denny v. Muncie*, 197 Ind. 28, 149 N. E. 639.

eral statutes vesting in cities the right to control and regulate the use of their streets. And in not a few instances the power to make such municipal regulations has been implied from the general duty and authority to protect and direct business transactions and to safeguard their citizens in their right to use the streets at will to go and come as they may desire. Ordinances prohibiting jitneys from accepting or discharging passengers on or near streets upon which street cars operate are generally upheld, but some courts have refused to sustain such regulations when made for the express purpose of creating or protecting a monopoly control of local transportation by street car systems.

Where the state has licensed motor vehicles for the privilege of operating within and between certain municipalities, such municipalities may not impose additional operating municipal regulations, proper for taxicabs operating only within its limits, for as the court said in the case of *Duncan v. Jonesboro*, 175 Ark. 650, 1 S. W. (2d) 58, P. U. R. 1928C, 239: "The defendant operated a motor vehicle between the city of Jonesboro and the town of Nettleton. It was operated over a fixed route and had fixed termini. It did not make any difference that most of the money made by the carrier was in transporting passengers within the city of Jonesboro and to various places along the line in the country. He had complied with the terms of the statute, and the Arkansas railroad commission had granted him a permit to operate a motor vehicle between the city of Jonesboro and the town of Nettleton. He had a right to receive passengers at stations along the line of his route or to accept and receive passengers and discharge them on signal. This is the business carried on by him subject to regulation under the act in question and was not subject to regulation by the city of Jonesboro as a person or company operating taxicabs within the city limits, as defined in the case of *State of Arkansas v. Haynes et al.* (Ark.), 300 S. W. 380, this day decided."

On the other hand, where the taxicab business is conducted within a municipality by parties residing beyond its limits, such business is subject to municipal regulation and license fees, for as the court said in the case of *Commonwealth v. Kelley*, 229 Ky. 722, 17 S. W. (2d) 1017: "Though it be true that Kelley and the other members of the class to which he belongs reside and have their taxi stations outside the city, we do not gather from the record that their sole business consists in carrying passengers through the city from points outside the city, but that they are actually engaged in doing business in the city. That being

true, they are subject to whatever fees and regulations that the city may impose upon taxicabs doing business wholly within the city. * * * As the requirement of liability insurance is in furtherance of the public safety, the situation is one where the rights of the individual will have to give way to the higher rights of the public. We therefore rule that the requirement is not an unreasonable exercise of the police power, and such is the view of the courts that have had occasion to pass on the question."

While municipalities may regulate the operation and parking of motor vehicles operating for hire upon their streets, the right to regulate parking does not include the power to prohibit parking entirely, for as the court said in the case of *Baker v. Hasler*, 218 Mo. App. 1, 274 S. W. 1095: "Plaintiff challenges the validity of the ordinance on the ground that it is not authorized by statute, and that it is void because unreasonable. * * * The ordinance at bar does not attempt to regulate the parking of automobiles used for carrying passengers for hire. It prohibits the parking of such automobiles. Laws 1921 (Extra Session), p. 100, subdivision (b) of section 24 authorizes municipalities to regulate the parking of vehicles on the streets, but neither this nor any other statute authorizes municipalities to prohibit the parking of vehicles on the streets. * * * We also think that the ordinance is void because unreasonable. * * * The city has authority to regulate the parking of vehicles described in the ordinance, but it has no authority to prohibit the parking of such vehicles."

§ 767. Regulation of existing system to avoid competition.—The policy of the law in these cases of local urban transportation as with the general and more extended systems is to protect the necessary existing system affording adequate service. These transient systems, with little or no money invested permanently in rights of way, roadbed and equipment and with no reserve capital to provide sustained service or to protect the public from damages, can not be permitted to enter a field uncontrolled, and, by taking the cream of the business in short-haul local fares, seriously to cripple or entirely disable the existing system which in most cases is rendering a necessary service and constitutes the only instrumentality for giving such service. Where additional service is necessary and the existing system of transportation fails to furnish it there is ample justification for admitting other parties to the field who offer the additional necessary service, but

not so in the case where this is furnished by the present system, for this plan avoids the duplicated cost and confusion of competition by resorting to the principle of regulation.

§ 768. **Bonds or liability insurance.**—Reasonable and proper measures of regulation for the operation of jitneys and other motor vehicle systems of transportation include the giving of an indemnity bond, sufficient to protect the passengers and public from personal injury or property damage resulting from the negligent operation of such common carriers. In lieu of such bonds, liability insurance is required in some cases, and, in either event, they are furnished for the benefit of anyone sustaining injury or damage due to the negligence of such carriers; and recovery may be had thereon in the name of the party injured in person or sustaining property damage. Such bonds or liability insurance is required to be furnished and deposited with the authority issuing the license or permit and as a condition precedent to such issue.

Municipalities have the power under proper statutory authority to require motor vehicles, operating for hire upon their streets, to give bond for the privilege of doing so under such reasonable provisions as may be required, for as the court said in *Kruger v. California Highway Indemnity Exchange*, 201 Cal. 672, 258 Pac. 602: "Appellant's liability was to pay the judgment, and in a contract of that character the promisor is bound by the judgment whether he have notice of the action or not, even though he is not a party thereto. * * * In fact, an individual is prohibited by this identical ordinance of the city and county of San Francisco from entering into a contract as a surety on a bond, required thereunder and this provision of the ordinance has been sustained by this court. * * * We know of no constitutional right that one has to give any particular kind of security. A legislative body having the right to require the giving of security necessarily has the right to prescribe the kind that shall be given, with the limitation always, of course, that its provisions in this regard shall not be unreasonable. * * * The municipality undoubtedly has the right within reasonable limits to prescribe the nature of the security to be given by those operating vehicles for hire upon its public streets. There is nothing unreasonable in the provisions of the ordinance requiring the operator of such a vehicle to protect the public by the bond or policy of insurance required therein and in the manner as required. * * * On the other hand, the liability which re-

spondent now seeks to enforce against appellant is one it voluntarily assumed."

A statute prohibiting the operation of motor vehicles for hire over regular routes, unless bonds or insurance is furnished to cover injuries to persons or property resulting from the negligent operation of such vehicles, will be sustained as a valid and reasonable regulation for the privilege of using the public highways and as a means of regulating its traffic. This requirement may be limited to motor vehicles operating near and within certain large cities where the traffic is heavy, which increases the hazards in the centers of population. This principle is established and discussed as follows in the case of *Chattanooga Dayton Bus Line v. Burney*, 160 Tenn. 294, 23 S. W. (2d) 669: "The statute prohibits the operation of motor vehicles for hire, between fixed termini or over a regular route, without executing bonds or providing insurance, for the benefit of the public and to provide for compensation for injuries to person or property, resulting from the negligent operation of such motor vehicles. Under the provisions of the statute, 'any person injured in person or property by the negligent operation of such a motor vehicle is entitled to institute suit jointly against the owner or operator of said machine and the obligor or insurer on said bond or policy.'

* * * The necessity for regulation of traffic on the public highways is directly affected by the density of population. It is a matter of common knowledge that the number of motor vehicles on the highways steadily increases as the traveler approaches the outskirts of the four largest cities of the state, located within the counties to which the statute applies. With the increase of traffic, the danger and likelihood of accidents increase. The statute does not alter or affect the measure of the liability of the wrongdoer, but is designed only to make more certain that the injured may secure compensation. The benefits of the statute do not accrue only to residents of the counties affected, but may be claimed by all persons who visit the centers of population and there suffer wrongful injury within the application of the statute. These and other reasonably conceivable considerations must be assumed to have impelled the legislature to consider this regulation necessary in the centers of population, for the protection of the public, and unnecessary elsewhere in the state.

* * * The statute is a police regulation, and the decision of the legislature as to what is a sufficient reason to justify a classification made in such a statute 'will not be reviewed by the courts unless it is palpably arbitrary.' *Darnell v. Shapard*, 156

Tenn. 544, 553, 3 S. W. (2d) 661, 663. We are not able to hold that the classification made by the statute is arbitrary."

In the regulation of motor vehicles operating as common carriers over its highways, the state may require surety bonds for the protection of persons or property which may sustain injury from the negligent operation of such motor vehicles, for as the court said in the case of *Hester v. Arkansas Railroad Comm.*, 172 Ark. 90, 287 S. W. 763, P. U. R. 1927B, 336: "The statutes of this state (Acts 1921, p. 177) plainly authorized the commission to regulate the operation of common carriers, and we have held that this authority extends to the operation of motor buses and vehicles of that kind being operated for hire on a public highway. * * * There are many decisions upholding the right of a state or municipality to regulate carriers on the public highways, and such regulations are generally sustained, but there are only a few cases which relate to the particular point involved in the present case; namely, the requirement to give bond with a surety company as surety. There are several decisions of the Supreme Court of Washington, beginning with the case of *State v. Seattle Taxicab & Transfer Co.*, 90 Wash. 416, 156 Pac. 837, which uphold a regulation identical with the one now under consideration. Other authorities are to the same effect. *Lutz v. New Orleans* (D. C.) 235 Fed. 978; *New Orleans v. Le Blanc*, 139 La. 113, 71 So. 248; and *Ex parte Sullivan*, 77 Tex. Cr. 72, 178 S. W. 537. * * * Our conclusion therefore is that the regulation is valid and that the circuit court was correct in so holding."

In the interest of the public safety, insurance may be required of motor vehicles operating as common carriers over the highways of the state as a safety precaution and protection against negligence for the benefit of the general public, as is indicated in the case of *Whitehead v. Board of Public Utility Comrs.*, 107 N. J. L. 41, 151 Atl. 369: "The reasons operating for the enactment of such comprehensive licensing power are not hard to discover. It was legislation under the police power intended for the protection of the inhabitants of the state and others using the public highways. Auto buses coming under the act are required to furnish an insurance policy conditioned for the payment of damages for injuries or death; to furnish a monthly statement of receipts and is subjected to a franchise tax thereon. No good reason exists why these salutary protective measures should not be as applicable to auto buses operating within the Camp Meeting Association territory as in the territory of any other section

of the state. It is common knowledge that in the Camp Meeting Association territory large masses of people from within and without the state are congregating especially during certain periods of the year. The measures provided for the protection of the public are as essential in such places as elsewhere."

§ 769. **Additional conditions and regulations.**—Additional regulations for the operation of motor vehicles as common carriers may properly include provisions for fixing a definite route and terminals, together with a regular schedule of regulated fares and service. Also regulations against overcrowding the capacity of the cars and for periodical official inspection of equipment and for the payment of license fees, sufficient to cover all expenses of supervision, inspection and regulation. The fees required to be paid before issuing a license or permit should also be sufficient to cover the fair share of the cost of the construction and maintenance of streets and highways used as the means of conducting such transportation systems. Jitneys may be denied the right to use congested streets and districts and if they be permitted to operate in such districts they may be denied the right to accept or discharge passengers therein.

§ 770. **Fares and other operating conditions.**—The subject of the regulation of motor vehicle traffic in serving the general public is still largely unsolved, and while it may be difficult to determine the proper charge or fare to cover the use, including the construction and repair of streets and highways for such motor vehicles, the soundness of the principle requiring such payment can not be questioned. The further matter of fixing reasonable fares and determining proper operating schedules and conditions is still largely an open question. This form of transportation is of such recent origin that the amount of capital required for its proper permanent operation and the element of risk involved has not yet been sufficiently determined by experience so as to make possible final rate regulations and to establish proper principles of depreciation and of the valuation of the investment. Of necessity, however, the return on the investment must be sufficient to attract the necessary capital permanently to maintain the service and to keep pace with the development of the art in improved and additional facilities, demanded by the public and made available by the manufacturer.

§ 771. **Growth and development of motor vehicle business.**—The growth and development of this industry is indicated by a

recent statement of one of the leading manufacturers of motorbus equipment that its business has increased in the past two years considerably more than 100 per cent and that the use of motor buses by railroads in this period to supplement their service has increased from seven hundred cars, operated by about thirty companies, to about five thousand cars, operated by two hundred steam or electric lines throughout the country. In establishing this supplemental service these lines required considerably more than half of the output of this manufacturer in the past year, who estimates that fifteen hundred new motorbus lines began operation within the year and that the equipment represents an approximate cost of thirty million dollars.

§ 772. **Valuation and depreciation of investment.**—Matters of depreciation of the investment, the proper return on it, and the principles of valuation with reference to this public utility are yet to be determined. The variety of makes and styles of cars, the difference of conditions under which they are operated, the element of risk involved in this investment and the human element, which enters so largely in its operation, all render the subject a peculiarly difficult one to solve. While California and a few other jurisdictions have attempted to regulate the issuing of securities for this very modern public utility the problem is still in its infancy and as the utility is coming to be owned and operated more generally by large concerns rather than individuals this question is receiving wider attention.

§ 773. **Policy and principles of regulation.**—While it is evident that such problems generally are being considered, it is obvious that, if the industry develops as rapidly in the next few years as in the past, the public utilities commissions, municipalities and other regulating agencies, having jurisdiction in the matter, will be required to determine the policy and fix the rules applicable to this public utility, consistent with the principles and in harmony with the practice laid down by such regulating agencies for all other public utilities. While the subject is a very recent one the development of the industry has been phenomenal and one hesitates to hazard an opinion as to the future development of our transportation systems, including as they now do commodious motor vehicles for passenger traffic, powerful trucks for the carrying of freight, and the airship, whose current use and development is full of possibilities, which will present many more new problems for early solution.

In the regulation of motor vehicles on public highways, the speed, weight, nature of the load and kinds of tires may be included and used as the basis of classification for the regulation in the interest of the public safety, as well as for the protection of the highway, for as the court said in the case of *Rosander v. Market St. R. Co.*, 89 Cal. App. 721, 265 Pac. 541: "There is nothing in the Motor Vehicle Act to suggest that these regulations of speed according to weight and tire equipment were intended solely for the protection of the roadbed. * * * We conclude that the purpose of these enactments was not solely for the protection of the roadbed. The state has taken to itself the matter of regulating the operation of automobiles on the public highways. By its mandate the speed of every kind of motor vehicle is fixed or regulated. The Motor Vehicle Act is primarily enacted for public safety, and its many provisions looking toward that end so indicate. To leave trucks of solid tire equipment and of a gross weight exceeding 22,000 pounds with the same speed regulations as a touring car would frustrate the attainment of the end sought. And therefore when the speed of such vehicles has been regulated it is not for the courts, in the absence of evidence thereon, to arbitrarily hold the regulation unreasonable as a speed limit but valid only as a road measure. We are of the opinion that the particular provision under consideration is a part of the general scheme to promote the safety of the public, although it may include some notion of the necessities of the roadbed."

§ 774. **Authorities and principles peculiar to industry cited and discussed.**—Because of the recency of the decisions and the importance of the subject, especially in view of its remarkable present and prospective development and its effect on other forms of transportation and communication and generally on modern industry and society, the authorities now available on the subject are here collected and will be discussed at considerable length; especially those dealing with facts and principles peculiar to this particular form of public utilities.¹⁰

¹⁰ United States. *Williams v. State of Arkansas*, 217 U. S. 79, 54 L. ed. 673, 30 Sup. Ct. 493, 18 Ann. Cas. 865; *Hendrick v. State of Maryland*, 235 U. S. 610, 59 L. ed. 385, 35 Sup. Ct. 140; *Terminal Taxicab Co. v. Kutz*, 241 U. S. 252, 60 L. ed. 984, 30 Sup. Ct. 583, Ann. Cas.

1916D, 765, P. U. R. 1916D, 972; *Kane v. State of New Jersey*, 242 U. S. 160, 61 L. ed. 222, 37 Sup. Ct. 30; *Packard v. Banton*, 264 U. S. 140, 68 L. ed. 596, 44 Sup. Ct. 257; *Michigan Public Utilities Comm. v. Duke*, 266 U. S. 570, 69 L. ed. 445, 45 Sup. Ct. 191; *Buck v. Kuykendall*, 267 U.

S. 307, 69 L. ed. 623, 45 Sup. Ct. 324; Bush v. Maloy, 267 U. S. 317, 69 L. ed. 627, 45 Sup. Ct. 326; Frost & Co. v. Railroad Comm. of California, 271 U. S. 583, 70 L. ed. 1101, 46 Sup. Ct. 605, P. U. R. 1926D, 483; Interstate Busses Corp. v. Holyoke St. R. Co., 273 U. S. 45, 71 L. ed. 530, 47 Sup. Ct. 298, P. U. R. 1927B, 46; Hess v. Pawloski, 274 U. S. 352, 71 L. ed. 1091, 47 Sup. Ct. 632; United States v. Simpson, 252 U. S. 465, 64 L. ed. 665, 40 Sup. Ct. 364, 10 A. L. R. 510; Wuchter v. Pizzutti, 276 U. S. 13, 72 L. ed. 446, 48 Sup. Ct. 259; Delaware, Lackawanna & C. R. Co. v. Morristown, New Jersey, 276 U. S. 182, 72 L. ed. 523, 48 Sup. Ct. 276, P. U. R. 1928C, 414; Interstate Busses Corp. v. Blodgett, 276 U. S. 245, 72 L. ed. 551, 48 Sup. Ct. 230, P. U. R. 1928C, 144; Sprout v. South Bend, Indiana, 277 U. S. 163, 72 L. ed. 833, 48 Sup. Ct. 502; Quaker City Cab Co. v. State of Pennsylvania, 277 U. S. 389, 72 L. ed. 927, 48 Sup. Ct. 553; Bekins Van Lines v. Riley, 280 U. S. 80, 74 L. ed. 178, 50 Sup. Ct. 64; Silver v. Silver, 280 U. S. 117, 74 L. ed. 221, 50 Sup. Ct. 57; District of Columbia v. Fred, 281 U. S. 49, 74 L. ed. 694, 50 Sup. Ct. 163; Interstate Transit v. Lindsey, 283 U. S. 183, 75 L. ed. 953, 51 Sup. Ct. 380; Smith v. Cahoon, 283 U. S. 553, 75 L. ed. 1264, 51 Sup. Ct. 582, P. U. R. 1931C, 448; McBoyle v. United States, 283 U. S. 25, 75 L. ed. 816, 51 Sup. Ct. 340; Hodge Drive-It-Yourself Co. v. Cincinnati, Ohio, — U. S. —, 76 L. ed. 323, 52 Sup. Ct. 144; Continental Baking Co. v. Woodring, — U. S. —, 76 L. ed. 1155, 52 Sup. Ct. 595; Sproles v. Binford, — U. S. —, 76 L. ed. 1167, 52 Sup. Ct. 581.

Federal. Depot Carriage & C. Co. v. Kansas City Terminal R. Co., 190 Fed. 212; Nolen v. Riechman, 225 Fed. 812; Lutz v. New Orleans, Louisiana, 235 Fed. 978, affd. in 237 Fed. 1018; Schoenfeld v. Seattle, Washington, 265 Fed. 726; Downs v. Georgia Casualty Co., 271 Fed. 310; Lane v. Whitaker, 275 Fed. 476; Interstate Motor Transit Co. v. Kuy-

kendall, 284 Fed. 882, P. U. R. 1923D, 444; Liberty Highway Co. v. Michigan Public Utilities Comm., 294 Fed. 703; Streater Aqueduct Co. v. Smith, 295 Fed. 385; Martine v. Kozzer, 11 Fed. (2d) 645; Schappi Bus Line v. Hammond, 11 Fed. (2d) 940; Black & White Taxicab & C. Co. v. Brown & Yellow Taxicab & C. Co., 15 Fed. (2d) 509, affd. in 276 U. S. 518, 72 L. ed. 681, 48 Sup. Ct. 404; Peoples Transit Co. v. Henshaw, 20 Fed. (2d) 87; Clark v. Poor, 20 Fed. (2d) 182, affd. in 274 U. S. 554, 71 L. ed. 1199, 47 Sup. Ct. 702, P. U. R. 1927D, 346; Bell v. Harlan, 20 Fed. (2d) 271, 57 App. D. C. 255; Sanger v. Lukens, 26 Fed. (2d) 855; Arneson v. Denny, 25 Fed. (2d) 983; Atlantic-Pacific Stages, Inc. v. Stahl, 36 Fed. (2d) 260, P. U. R. 1930B, 411; Carley & Hamilton, Inc. v. Snook, 38 Fed. (2d) 1003, affd. in 281 U. S. 66, 74 L. ed. 704, 50 Sup. Ct. 204; Southern Motorways, Inc. v. Perry, 39 Fed. (2d) 145, P. U. R. 1930C, 131; Bailey v. Smith, 40 Fed. (2d) 958; Madden Bros. v. Railroad & Warehouse Comm., 43 Fed. (2d) 236; Patrick v. Smith, 45 Fed. (2d) 924; First National Bank v. Holliday, 47 Fed. (2d) 67; Johnson Transfer & C. Lines v. Perry, 47 Fed. (2d) 900, P. U. R. 1931C, 308; Alkazin v. Wells, 47 Fed. (2d) 904; Blease v. Safety Transit Co., 50 Fed. (2d) 852; Ashbury Truck Co. v. Railroad Comm. of California, 52 Fed. (2d) 263; Stephenson v. Binford, 53 Fed. (2d) 509; Cannonball Transp. Co. v. American Stages, Inc., 53 Fed. (2d) 1051; Louis v. Boynton, 53 Fed. (2d) 471; Kitagawa v. Shipman, 54 Fed. (2d) 313; Prouty v. Coyne, 55 Fed. (2d) 289; Continental Baking Co. v. Woodring, 55 Fed. (2d) 347; Morrow v. Asher, 55 Fed. (2d) 365; Denver & C. Western R. Co. v. Linck, 56 Fed. (2d) 957; McLeaish v. Binford, 52 Fed. (2d) 151; Sproles v. Binford, 52 Fed. (2d) 730; Phillips v. Moulton, 54 Fed. (2d) 119; Sproles v. Binford, 56 Fed. (2d) 189; Nutt v. Ellerbe, 56 Fed. (2d) 1059; Ogden & C. Co. v. Michigan Public Utilities Comm., 58 Fed. (2d) 832.

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P. U. R. 1916A, 834; Memphis St. R. Co. v. Rapid Transit Co., 138 Tenn. 594, 198 S. W. 890, P. U. R. 1918B, 564; Chattanooga Dayton Bus Line v. Burney, 160 Tenn. 294, 23 S. W. (2d) 669; Price-Bass Co. v. McCabe, 161 Tenn. 67, 29 S. W. (2d) 249; State v. Bates, 161 Tenn. 211, 30 S. W. (2d) 248; Frazier v. Lindsey, 162 Tenn. 228, 36 S. W. (2d) 436; Moore v. Life & c. Ins. Co., 162 Tenn. 682, 40 S. W. (2d) 403; Johnson City Trac. Corp. v. Sell (Tenn.), 44 S. W. (2d) 312; Johnson Transfer & Freight Line, Inc. v. Marion County (Tenn.), 50 S. W. (2d) 229; East Tennessee & c. Motor Transp. Co. v. Carden (Tenn.), 50 S. W. (2d) 230.

Texas. McCutcheon v. Wozen-craft, 116 Tex. 440, 294 S. W. 1105; Arlington v. Lillard, 116 Tex. 446, 294 S. W. 829; Greene v. San Antonio (Tex.), 178 S. W. 6; Booth v. Dallas (Tex.), 179 S. W. 301; Auto Transit Co. v. Ft. Worth (Tex.), 182 S. W. 685, P. U. R. 1916C, 565; Fort Worth v. Lillard (Tex.), 272 S. W. 577; Ball v. McKinney (Tex.), 286 S. W. 341; El Paso v. Look (Tex.), 288 S. W. 506; Waco v. Grimes (Tex.), 288 S. W. 1113; Doepenschmidt v. New Braunfels (Tex.), 289 S. W. 425; Campbell v. Groh (Tex.), 8 S. W. (2d) 712; Genusa v. Houston (Tex.), 10 S. W. (2d) 772; Reverra-Fewell Undertaking Co. v. James (Tex.), 13 S. W. (2d) 464; Miks v. Leath (Tex.), 26 S. W. (2d) 726; American Fidelity & c. Co., Inc. v. Williams (Tex.), 34 S. W. (2d) 396; Kennedy v. McMullen (Tex.), 39 S. W. (2d) 168; Allred v. J. C. Engelman, Inc. (Tex.), 40 S. W. (2d) 945; Box v. Newsom (Tex. App.), 43 S. W. (2d) 981; Peters v. San Antonio (Tex. Civ. App.), 195 S. W. 989, P. U. R. 1917F, 903; Craddock v. San Antonio (Tex. Civ. App.), 198 S. W. 634; Dallas v. Gill (Tex. Civ. App.), 199 S. W. 1144; Lindsley v. Dallas Consol. St. R. Co. (Tex. Civ. App.), 200 S. W. 207; Gill v. Dallas (Tex. Civ. App.), 209 S. W. 209, P. U. R. 1919C, 700; San Antonio v. Besteiro (Tex. Civ.

App.), 209 S. W. 472; Graham v. Seal (Tex. Civ. App.), 235 S. W. 668; San Antonio v. Fetzer (Tex. Civ. App.), 241 S. W. 1034, P. U. R. 1923E, 423; Mahaney v. Cisco (Tex. Civ. App.), 248 S. W. 420; Prater v. Storey (Tex. Civ. App.), 249 S. W. 871; Waide v. Ft. Worth (Tex. Civ. App.), 258 S. W. 1114; Davis v. Houston (Tex. Civ. App.), 264 S. W. 625; Wichita Falls Trac. Co. v. Raley (Tex. Civ. App.), 17 S. W. (2d) 157; Woolf v. Del Rio Motor Transp. Co. (Tex. Civ. App.), 27 S. W. (2d) 874, P. U. R. 1930D, 308; Texas Motor Coaches v. Railroad Commission (Tex. Civ. App.), 41 S. W. (2d) 1074; Ford v. Tyson (Tex. Civ. App.), 43 S. W. (2d) 619; Railroad Commission v. Rau (Tex. Civ. App.), 45 S. W. (2d) 413; McCutcheon v. Wozen-craft (Tex. Com. App.), 255 S. W. 716; Ex parte Vance, 42 Tex. Cr. 619, 62 S. W. 568; Ex parte Sullivan, 77 Tex. Cr. 72, 178 S. W. 537, P. U. R. 1915E, 441; Ex parte Bogle, 78 Tex. Cr. 1, 179 S. W. 1193; Ex parte Parr, 82 Tex. Cr. 525, 200 S. W. 404; Ex parte Beck, 92 Tex. Cr. 20, 241 S. W. 172; Ex parte Polite, 97 Tex. Cr. 320, 260 S. W. 1048; Ex parte Luna, 98 Tex. Cr. 458, 266 S. W. 415; Ex parte Schutte (Tex. Cr.), 42 S. W. (2d) 252; Reaves v. State (Tex. Cr.), 50 S. W. (2d) 236.

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(Utah), P. U. R. 1921D, 377; In re Clark (Utah), P. U. R. 1924A, 268; Blue & Gray Bus Line (Utah), P. U. R. 1924A, 449; In re Payne (Utah), P. U. R. 1924A, 545; In re Streeter (Utah), P. U. R. 1924B, 392.

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Washington. Seattle v. Hurst, 50 Wash. 424, 97 Pac. 454, 18 L. R. A. (N. S.) 169; City Cab, Carriage & Co. v. Hayden, 73 Wash. 24, 131 Pac. 472, L. R. A. 1915F, 726, Ann. Cas. 1914D, 731; State v. Howell, 85 Wash. 294, 147 Pac. 1159, Ann. Cas. 1916A, 1231; Seattle Taxicab & Co. v. Seattle, 86 Wash. 594, 150 Pac. 1134; State v. Seattle Taxicab & Co., 90 Wash. 416, 156 Pac. 837, P. U. R. 1916E, 805; State v. Collins, 93 Wash. 614, 161 Pac. 467; State v. Ferry Line Auto Bus Co., 93 Wash. 614, 161 Pac. 467, P. U. R. 1917F, 903; Allen v. Bellingham, 95 Wash. 12, 163 Pac. 18, P. U. R. 1917E, 381; Salo v. Pacific Coast Casualty Co., 95 Wash. 109, 163 Pac. 384, L. R. A. 1917D, 613; Nelson v. Pacific Coast Casualty Co., 96 Wash. 43, 164 Pac. 594; Hadfield v. Lundin,

98 Wash. 657, 168 Pac. 516, L. R. A. 1918B, 909, Ann. Cas. 1918C, 942; Cushing v. White, 101 Wash. 172, 172 Pac. 229, L. R. A. 1918F, 463; Spokane v. Knight, 101 Wash. 656, 172 Pac. 823; Puget Sound Trac., Light & Co. v. Grassmeyer, 102 Wash. 482, 173 Pac. 504, L. R. A. 1918F, 469; State v. Spokane, 109 Wash. 360, 186 Pac. 864; McGloth-ern v. Seattle, 116 Wash. 331, 199 Pac. 457; State v. Kuykendall, 117 Wash. 415, 201 Pac. 778; State v. Department of Public Works, 119 Wash. 381, 206 Pac. 21, P. U. R. 1922E, 335; In re Sound Transit Co., 119 Wash. 684, 206 Pac. 931, P. U. R. 1922D, 580; Knowles v. Kuykendall, 122 Wash. 315, 210 Pac. 666, P. U. R. 1923B, 190; State v. Price, 122 Wash. 421, 210 Pac. 787; State v. Superior Court, 123 Wash. 116, 212 Pac. 259; Northern Pacific R. Co. v. Schoenfeldt, 123 Wash. 579, 213 Pac. 26; State v. Department of Public Works, 123 Wash. 705, 213 Pac. 31; State v. Department of Public Works, 124 Wash. 234, 214 Pac. 164, P. U. R. 1923E, 101; Davis v. Nickell, 126 Wash. 421, 218 Pac. 198, P. U. R. 1924A, 486; Cook v. Lawwill, 127 Wash. 92, 219 Pac. 864; State v. Department of Public Works, 127 Wash. 121, 219 Pac. 878, P. U. R. 1924C, 156; Davis v. Clev-inger, 127 Wash. 136, 219 Pac. 845, P. U. R. 1924C, 153; Davis v. Mac-Kay, 128 Wash. 333, 222 Pac. 491; State v. Department of Public Works, 129 Wash. 5, 223 Pac. 1048; Chelan Transfer Co. v. Foote, 130 Wash. 511, 228 Pac. 297; Davis v. Metcalf, 131 Wash. 141, 229 Pac. 2; Stoltzing v. Kuykendall, 131 Wash. 392, 230 Pac. 405; Yelton v. Depart-ment of Public Works, 136 Wash. 445, 240 Pac. 679; State v. Bee Hive Auto Service Co., 137 Wash. 372, 242 Pac. 384; Great Northern R. Co. v. Department of Public Works, 137 Wash. 548, 242 Pac. 1092, P. U. R. 1926C, 335; State v. Superior Court, 138 Wash. 376, 244 Pac. 734; State v. Department of Public Works, 141 Wash. 168, 250 Pac. 1088, P. U. R. 1927C, 305; International Motor

Transit Co. v. Seattle, 141 Wash. 194, 251 Pac. 120; Spokane Northwest Auto Freight v. Tedrow, 144 Wash. 481, 258 Pac. 31; Spokane Northwest Auto Freight v. Department of Public Works, 148 Wash. 61, 268 Pac. 138; Big Bend Auto Freight v. Oggers, 148 Wash. 521, 269 Pac. 802; North River Transp. Co. v. Denney, 149 Wash. 489, 271 Pac. 589; Wall v. Smart, 150 Wash. 333, 272 Pac. 711; Deppman v. Department of Public Works, 151 Wash. 78, 275 Pac. 70; Williams v. Denney, 151 Wash. 630, 276 Pac. 858; Independent Truck Co. v. Wright, 151 Wash. 372, 275 Pac. 726; Pacific Northwest Trac. Co. v. Department of Public Works, 151 Wash. 659, 276 Pac. 566; North Bend Stage Line v. Denney, 153 Wash. 439, 279 Pac. 752; Auto Interurban Co. v. Department of Public Works, 153 Wash. 479, 279 Pac. 738; State v. Higgins, 155 Wash. 227, 283 Pac. 1074; North Coast Transp. Co. v. Department of Public Works, 157 Wash. 79, 288 Pac. 245; Denman v. Department of Public Works, 157 Wash. 447, 289 Pac. 34, 291 Pac. 1115; Puget Sound Navigation Co. v. Director of Public Works, 157 Wash. 557, 289 Pac. 1006, P. U. R. 1930E, 289; Washington Motor Coach Co. v. Baker, 158 Wash. 588, 291 Pac. 733; North Bend State Line, Inc. v. Department of Public Works, 162 Wash. 46, 297 Pac. 780, P. U. R. 1931C, 484; State v. Department of Public Works (Wash.), 223 Pac. 1048, P. U. R. 1924D, 114; State v. Inland Forwarding Corp. (Wash.), 2 Pac. (2d) 888, P. U. R. 1931E, 394; State v. Department of Public Works (Wash.), 6 Pac. (2d) 64; Comfort v. Penner (Wash.), 6 Pac. (2d) 604; North Bend Stage Line v. Washington Motor Coach Co. (Wash.), 8 Pac. (2d) 302; Spokane v. Washington Water Power Co. (Wash.), P. U. R. 1921D, 762; Rainier National Park Co. (Wash.), P. U. R. 1921E, 828; In re Barker Motor Bus Co. (Wash.), P. U. R. 1921E, 836; In re Jossy (Wash.), P. U. R. 1924B, 420.

West Virginia. Ex parte Dickey, 76 W. Va. 576, 85 S. E. 781, L. R. A. 1915F, 840 P. U. R. 1915E, 93; Brown Shoe Co. v. Hardin, 77 W. Va. 611, 87 S. E. 1014, L. R. A. 1915D, 1199; State v. Fortney, 93 W. Va. 292, 116 S. E. 753, P. U. R. 1923D, 524; Collins v. Public Service Comm., 94 W. Va. 455, 119 S. E. 288, P. U. R. 1924C, 275; Carson v. Woodram, 95 W. Va. 197, 120 S. E. 512, P. U. R. 1924B, 785; Combs v. Bluefield, 97 W. Va. 395, 125 S. E. 239; State v. Vaughan, 97 W. Va. 563, 125 S. E. 583; Monongahela West Penn Public Service Co. v. State Road Comm., 104 W. Va. 183, 139 S. E. 744; Ellis v. State Road Commission, 100 W. Va. 472, 131 S. E. 7; State v. Road Commission, 105 W. Va. 90, 141 S. E. 524; Smith v. Nunnally (W. Va.), P. U. R. 1915E, 177; Charleston Interurban R. Co. (W. Va.), P. U. R. 1916F, 338.

Wisconsin. Ehlers v. Gold, 166 Wis. 185, 164 N. W. 845; Monroe v. Railroad Commission, 170 Wis. 180, 174 N. W. 450, 9 A. L. R. 1007, P. U. R. 1920A, 721; McCaffery v. Automobile Liability Co., 176 Wis. 230, 186 N. W. 585; Anderson v. Yellow Cab Co., 179 Wis. 300, 191 N. W. 748, 31 A. L. R. 1197; Vanderwerker v. Superior, 179 Wis. 638, 192 N. W. 60, P. U. R. 1923C, 236; State v. Railroad Commission, 196 Wis. 410, 220 N. W. 390; Interstate Trucking Co. v. Dammann (Wis.), 241 N. W. 625; In re Duluth St. R. Co. (Wis.), P. U. R. 1916D, 614; Rudolf v. Southern Wisconsin R. Co. (Wis.), P. U. R. 1916E, 1074; In re Wisconsin Gas &c. Co. (Wis.), P. U. R. 1918E, 752; Wisconsin Jitney-mens Assn. (Wis.), P. U. R. 1920A, 915; Peters v. Ahnapee &c. R. Co. (Wis.), P. U. R. 1921E, 151; State v. Public Service Comm. (Wis.), 242 N. W. 668.

Wyoming. Salt Creek Transp. Co. v. Public Service Comm., 37 Wyo. 488, 263 Pac. 621; Weaver v. Public Service Comm., 40 Wyo. 462, 278 Pac. 542, P. U. R. 1929D, 625.

§ 775. **Reasons and rules for regulation.**¹¹—The policy of regulation upon which our present public utilities commission plan is based and which tends to do away with competition among public utilities, as they are natural monopolies, is at once the reason and the justification for the holding of our courts that the regulation of an existing system of transportation, which is properly serving a given field or may be required to do so, is to be preferred to competition among several independent systems. In requiring a proper service from a single system for a city or territory, in consideration for protecting it as a monopoly for all the service required and in conserving its resources, no economic waste results and service may be furnished at the minimum cost. The prime object and real purpose of commission control is to secure adequate sustained service for the public at the least possible cost, and to protect and conserve investments already made for this purpose. Experience has demonstrated beyond any question that competition among natural monopolies is wasteful economically and results finally in insufficient and unsatisfactory service and extravagant rates. Neither the number of the individuals demanding other service nor the question of fares constitutes the entire question, but rather what the proper agency should be to furnish the best service to the public generally and continuously at the least cost. Anything which tends to cripple seriously or destroy an established system of transportation that is necessary to a community is not a convenience and necessity for the public and its introduction would be a handicap rather than a help ultimately in such a field.

By express statutory provision in many jurisdictions, certificates of convenience and necessity can only be issued to another motor vehicle system to serve territory where the existing motor transportation company fails to provide convenient and necessary service. As inadequacy of service is a question of fact which the applicant must establish, an action of the commission which does not take it into consideration will be set aside as invalid for a failure to comply with the statutory requirements, because, as the court said in the case of *Coney Island Motor Bus Corp. v. Public Utilities Comm.*, 115 Ohio St. 47, 152 N. E. 25, P. U. R. 1926E, 284: "In the first case the part of the route outside covered a distance of three hundred feet only, and in the other approximately a distance of one mile. But whether the portion

¹¹ This section of third edition quoted in *Seaboard Air Line R. Co. v. Wells*, 100 Fla. 1027, 130 So. 587.

outside of the municipal zones was three hundred feet or fifty miles, the jurisdiction of the public utilities commission attached. * * * We think that the construction the commission gave section 614-87, General Code, was a proper interpretation thereof; but that in failing to take into consideration the inadequacy of service, which the applicants tendered on the hearing, the commission fell into error. The only method by which a new bus line could enter the preempted territory was that provided for in the section last quoted. Before receiving their certificates the applicants were required to show the inadequacy of service of the certificated motor transportation companies occupying the routes, and then they could only obtain their certificates of public convenience and necessity if the existing motor transportation companies did not give convenient and necessary service in compliance with the order of the commission, as defined in the last clause of section 614-87, General Code."

Inadequacy of service occurring within municipalities is a question of fact which may properly be determined by the municipality concerned, and the fact that the local system had been operating without profit is a further fact which should be considered in establishing sufficient inadequacy in the present service to justify the necessity and the feasibility of authorizing additional service by another concern, for as the court said in the case of *East End Traction Co. v. Public Utilities Comm.*, 115 Ohio St. 119, 152 N. E. 20, P. U. R. 1926D, 642: "Any inadequacy of service, if proved, resulted from service within the three cities. It is not contradicted in the record that the East End Traction Company had 'made no net revenue over operating expenses and taxes for the last five years.' Necessarily the commission should have given some consideration to that fact, in so far as the depletion of revenues might necessitate a later abandonment of the traction line altogether. The Municipal Railway Company is operated under a franchise from the city of Youngstown, known as the 'service at cost franchise', the rate of fare being at the time of hearing eight cents in cash, with seven tickets for fifty cents. We think that municipal regulations may safely be permitted to take care of the adequacy of service within the limits of these municipalities, and that the record fails to show that at the present time public convenience and necessity require additional operation by motor transportation over that part of the route between Lowellville and Youngstown."

A certificate of public convenience and necessity, issued by the railroad commission to motor vehicles operating for hire on the

public highways, will be set aside where the commission failed to give due consideration to the present service and its proper extension, if and where it is not at the time or may not in the future be entirely adequate. In considering what service best serves the public convenience and necessity, economically and continuously, the courts consider the investments already made in furnishing the existing service as well as the financial capacity and economical efficiency of the proposed additional service. To conserve investments already made, and to secure the best service at the most reasonable rates for the benefit of the public, which is the paramount purpose to be considered, the courts generally favor a reasonable protection of the present system, with the privilege of extending its service when additional facilities are required in the interest of the public, rather than granting a certificate for additional service to another concern. This principle is clearly and fully set forth, and its application is discussed in a most interesting manner as follows in the case of Seaboard Air Line R. Co. v. Wells, 100 Fla. 1027, 130 So. 587, P. U. R. 1931A, 433, where the court said in part: "The right of a citizen to travel upon the highway and to transport his property in the ordinary course of life and business differs radically from the use of the public highway to conduct a private business for profit. There can be no doubt that the latter is not an inherent right. It is rather in the nature of a privilege or permission which can be granted or withheld by the state, or, when permitted, can be subjected to regulation and control by the state. The operation of such motor vehicle carriers for profit on the public highways is a special use of them which tends to obstruct and impede ordinary traffic and requires additional construction, maintenance, and repairs of the highways at the expense of the public. This condition of affairs furnishes additional reasons for their regulation and control. 42 C. J. 675; Pond on Public Utilities (third edition), section 806. * * * The legislature of 1929 evidently concluded that the conditions which had arisen in this state under the old laissez faire policy, or lack of policy, toward such use of the public highways, demanded a remedy, and the remedy which was adopted was the quite comprehensive statute above referred to. * * * Mr. Pond, in his work on Public Utilities (third edition), section 775, says: * * * [See this section, paragraph 1.] The principle thus stated by Mr. Pond was substantially followed by this court in the recently decided case of Florida Motor Lines v. Railroad Commissioners, 129 So. 876, 886. * * * This part of the statute provides

that no certificate of public convenience and necessity shall be issued without a hearing on the application therefor, of which hearing notice shall be given to the applicant and 'to all transportation companies serving any part of the routes between the fixed termini,' etc. * * * Thus the language, 'all transportation companies,' is much broader than the definition of auto transportation companies, and is certainly broad enough to cover both railroad transportation companies as well as auto transportation companies. Furthermore, in another paragraph of subsection 6 of section 3, it is provided that, in granting an application for certificate, the commission may take into consideration certain elements named, adding thereto this language, 'as well as the effect that the granting of such certificate may have upon other transportation facilities within the territory sought to be served by such applicant, and also the effect upon transportation as a whole within said territory,' etc. But it is inevitable that the railroad commission would be compelled to give consideration to 'other transportation facilities' and 'transportation facilities as a whole' within the territory sought to be served by the applicant, including railway transportation, in order to give full force and effect to the fundamental provision of the act, in section 2 thereof, that 'no auto transportation company shall operate any motor vehicle for the transportation of persons or property for compensation on any public highway in this state without first having obtained from the railroad commission a certificate that the present or future public convenience and necessity requires or will require such operation.' This public convenience and necessity is the polestar, which primarily must guide the commission in its administration of the statute. * * * That the law is drawn upon the theory of preventing destructive competition and unnecessary use of the highways is further shown by the provision in subsection 6 of section 3 that, in the case of an application by an auto transportation company to operate in the territory already served by a certificate holder, the certificate may be granted only where the existing certificate holder fails to provide service and facilities satisfactory to the commission. It may throw some light on the question we are discussing to here set forth section 776 of Pond on Public Utilities, which quotes at some length from an Illinois case: * * * [See section 776, paragraph 1, herein.] The evidence in this case shows that the proposed bus line service practically duplicates passenger service rendered by the petitioning railroads over the same route, the schedule authorized by the order being substantially the same as

the train schedule between New Orleans and Jacksonville, that the existing railroad service was amply sufficient to care for all traffic offered, and that the carriers were able and willing to expand service to provide for any increased demand. It further appears that the establishment of the proposed service would take passengers away from these railroads, and that practically all the passengers who would use this bus service would be taken from the railroads. It also appears that there could be but little new local traffic on the night schedules applied for, especially in view of the existing daylight bus service in addition to the existing railroad day service. It also appears that if, as has been sometimes suggested, bus service affords the passenger a better opportunity to view the country through which he passes, this feature would not apply to the night service in question. It is further shown in the evidence that the passenger traffic over the railroad lines in question has been seriously curtailed by private automobiles and motorbus lines, and that the subtraction from passengers of those now using the railroad service in question would further seriously impair passenger earnings, and would permit a probably destructive competition with the through-night passenger traffic which still remains with the railroads, which would tend to produce heavy public burdens in the way of increased freight rates. It is suggested that the bus line will furnish the convenience of the 'stop and pick up' service and that the fare is cheaper than the railroads. But it does not appear that this feature of the bus service would be more than a slight convenience to a limited number of people, and that, as to this night service, it does not constitute any considerable factor, amounting to a public necessity, within the meaning of the law. And a cheaper rate, as we have seen, does not of itself authorize the granting of a certificate. On the other hand, it appears that the railroads perform certain vital services to the public as to night schedules which the bus company can not perform. They furnish sleeping accommodations, meals, and other accommodations, such as toilet facilities, on the trains, and furnish the usual facilities at all stations. * * * As it appears from the evidence adduced and the proceedings had that, in making the order here challenged, the railroad commissioners did not give due consideration to the existing railroad service over the route and between the termini designated in the application, we conclude in this case, as in the Florida Motor Lines Case, supra, that the order as made is not warranted by the showing made in the record under the law that is applicable thereto; therefore the motion to

quash the writ of certiorari is denied, and the order complained of is quashed."

§ 776. Policy of commission control stated with reasons.¹²—These fundamental principles and the reasons on which they are based are perhaps best stated in the case of *West Suburban Transp. Co. v. Chicago & West. Towns R. Co.*, 309 Ill. 87, 140 N. E. 56, as follows: "If the transportation facilities furnished by appellee are so inadequate as to subject the public to inconvenience, and the operation of appellant's bus lines would eliminate that inconvenience, the order of the commission was authorized. It is not the policy of the Public Utilities Act to promote competition between common carriers as a means of providing service to the public. The policy established by that act is that, through regulation of an established carrier occupying a given field and protecting it from competition it may be able to serve the public more efficiently and at a more reasonable rate than would be the case if other competing lines were authorized to serve the public in the same territory. Methods for the transportation of persons are established and operated by private capital as an investment, but as they are public utilities the state has the right to regulate them and their charges, so long as such regulation is reasonable. The policy of the Public Utilities Act is that existing utilities shall receive a fair measure of protection against ruinous competition. * * * Where one company can serve the public conveniently and efficiently, it has been found from experience that to authorize a competing company to serve the same territory ultimately results in requiring the public to pay more for transportation, in order that both companies may receive a fair return on the money invested and the cost of operation. * * * Whether the public convenience and necessity require the establishment of a new transportation facility is not determined by the number of individuals who may ask for it. The public must be concerned, as distinguished from any number of individuals. *Public Utilities Comm. v. Toledo, St. Louis & Western Railroad Co.*, 286 Ill. 582, 122 N. E. 158. Some individuals—perhaps a considerable number—would be inconvenienced by the operation of the bus lines; but it is clear from the record that to the great body of the public it would be neither a convenience nor necessity. It was not within the authority of the commission to au-

¹² This section of third edition quoted in *Seaboard Air Line R. Co. v. Wells*, 100 Fla. 1027, 130 So. 587.

thorize the operation of the bus lines for the convenience of a small part of the public already served by other utilities at no very great inconvenience. * * * The commission had authority to regulate the rate charged by the appellee, and if its fares were excessive to reduce them. Fares are not the only thing to be considered in a case of this kind. The public is interested and vitally concerned in adequate transportation facilities at reasonable rates, and the state is interested in assisting to get them; but the state can not, as we have said, require a carrier to furnish service at a rate which will not pay a fair return on the investment and cost of operation. * * * The effect of authorizing the operation of the bus lines at a lower fare to serve the same territory would be to decrease appellee's revenues, and, if the rate it is now charging is a reasonable one, to require it to operate at a loss or increase its rate. This would be against the public interest, because appellant's lines can not accommodate more than a comparatively small portion of the public in the matter of transportation."

An order of the commission granting a certificate of convenience and necessity for the operation of a second motorbus line where the present line was meeting the requirements of the public and was in a position to render efficient and satisfactory service will be set aside by the court as arbitrary and unreasonable as well as confiscatory in its effect on the existing service, especially where there is not sufficient traffic to sustain two lines. This principle is generally recognized and well stated as follows in the case of *Superior Motor Bus Co. v. Community Motor Bus Co.*, 320 Ill. 175, 150 N. E. 668, P. U. R. 1926C, 685: "The Public Utilities Act does not give to the commission such arbitrary powers as will result in confiscation of the property of utility companies, but expressly requires that the orders of the commission shall be lawful and reasonable, and provides for a review of its orders by the courts. *State Public Utilities Commission v. Toledo, St. Louis & Western Railway Co.*, 107 N. E. 774, 267 Ill. 93. The evidence in the case showing that appellant had been meeting all the requirements of the public and of the commission between Belleville and Mascoutah, and that it was ready, able, and willing to render efficient service to the public, and it being conceded by all parties that there was not sufficient traffic over this route to justify the operation of two motorbus lines, the action of the commission in granting a certificate of convenience and necessity to appellee was in violation of the rules laid down in the authorities cited, and was unreasonable, arbitrary, and confiscatory. The

order of the circuit court confirming the order of the commissions is reversed, and the order of the commission set aside."

§ 777. **Service without duplicated investments and operating costs.**—To avoid unnecessary duplicated investments and operating costs, with resulting unsatisfactory service ultimately, is the reason and justification for protecting established systems of transportation and attempting to secure the necessary service from them rather than resorting to other systems, which are not established and may prove irresponsible or unequal to the demands of the public service. When, however, the existing system fails or refuses to furnish proper service for a given field, such a condition or attitude justifies and requires the introduction of new and different systems of transportation. As this same court said in the leading case of *Choate v. Commerce Commission*, 309 Ill. 248, 141 N. E. 12: "The railroads in this country have kept pace with the industrial development and the population increase, and the prosperity of the nation has been due to a large extent to the steady expansion of the transportation system. The savings of hundreds of thousands of investors have been massed to build our great network of railroads, and these transportation systems are entitled to protection from irresponsible competition. If shoestring transportation companies, with no money invested in right-of-way and no reserve capital to provide adequate service, or to protect the public from damage, are permitted to drop in here and there and take the cream of the transportation business from the permanent transportation systems, disastrous results are inevitable. If the permanent highways built at the expense of the people are destroyed, these irresponsible bus lines, that profess to serve the public convenience and to supply public necessity, will leave the public to walk or to provide other transportation facilities. Orders of the public authorities to furnish adequate transportation facilities would be unavailing, because the bus lines would be wholly incapable of complying with the order. * * * If the existing transportation company does not comply with the commission's order, then a situation may arise where the public convenience and necessity will require the establishment of another system. The theory of the Public Utilities Act is to provide the public with efficient service at a reasonable rate by compelling an established carrier occupying a given field to provide adequate service and at the same time to protect the existing utility from ruinous competition. *West Suburban Transportation Co. v. Chicago & West Towns Railway Co.* (15273), 140 N. E. 56. By this method the public is

protected from paying the cost of the operation of competing systems and a return upon a double investment of capital. No doubt the proposed bus line would accommodate a few individuals in the Fox River valley, but the convenience and necessity which the law requires to support the commission's order is the convenience and necessity of the public as distinguished from that of an individual or any number of individuals."

In order to avoid duplication of investments and maintenance and operating expenses, a certificate of convenience and necessity should not be granted, unless it is necessary in the public interest because the existing service is not adequate or in a position to fully serve the public needs for transportation. What constitutes public convenience and necessity in any particular instance is frequently difficult to determine as it varies with the demands of different localities, and since a decision of this matter rests in the discretion of the state commission, its judgment should be sustained where the evidence shows that it was reasonable and just in considering the existing service and its capacity for extensions and improvements and the public welfare which is always paramount. This principle is discussed at length, and its practical application fully considered as follows by this same court in the later case of *Egyptian Transp. System v. Louisville & Nashville R. Co.*, 321 Ill. 580, 152 N. E. 510: "What constitutes public convenience and necessity is a matter not always easy to determine. One train each way per day met the demands a generation ago, but no one will contend that such would meet the needs of any community of average population today. While this district is not suburban territory and the occupations of the people do not make it appear that there is in this community a necessity for two-hour service, that is a matter primarily in the province of the commerce commission to determine, and the court is not authorized to substitute its judgment for that of the commission where there is any substantial basis in the evidence upon which to base a finding of such necessity. * * * To authorize an order of the commerce commission granting a certificate of convenience and necessity to one carrier though another is in the field it is necessary that it appear first that the existing utility is not rendering adequate service. *West Suburban Transportation Co. v. Chicago & West Towns Railway Co.*, 309 Ill. 87, 140 N. E. 56. The method of regulation of public utilities now in force in Illinois is based on the theory of a regulated monopoly rather than competition, and before one utility is permitted to take the business of another already in

the field it is but a matter of fairness and justice that it be shown that the new utility is in a position to render better service to the public than the one already in the field. *Chicago Motor Bus Co. v. Chicago Stage Co.*, 287 Ill. 320, 122 N. E. 477. It is in accord with justice and sound business economy that the utility already in the field be given an opportunity to furnish the required service."

§ 778. **Origin of policy of issuing certificates of public convenience and necessity.**—The policy of resorting to regulation by commissions to avoid the waste and unsatisfactory service resulting from competition among natural monopolies is the reason for the plan of issuing certificates of "public convenience and necessity" only where the public requires additional facilities. The analogy if not the origin of this plan and policy of certification, as it obtains now almost universally in the public utility field, is to be found in the system of establishing streets and highways, for they are laid out and constructed only when required by the "convenience and necessity" of the public. This is well stated in connection with its application to our modern system of public utility regulation in the early case, decided in 1897, of *In re Shelton St. R. Co.*, 69 Conn. 626, 38 Atl. 362, where the court applied the principle in determining that "public convenience and necessity" did not require an additional electric system of transportation to parallel a steam line already established and giving adequate service, and for this reason refused its permission to build such additional system of transportation. In the course of its opinion the court said: "Public necessity, in this sense, is that urgent, immediate public need arising from existing conditions which, in the judgment of the legislature, justifies a disturbance of private rights that otherwise might be legally exempt from such interference. The term is, therefore, a relative one. It determines in each case that may arise the relation of the duty implied in the broad grant of legislative power to promote by appropriate action the interests of the commonwealth to the limitations of that power established for the protection of private rights. * * * In this incidental way courts have been called upon to decide whether conditions existing in a particular case create 'a public convenience and necessity,' within the meaning of some legislative act. The substantial thing to be decided retains much of the inherent indeterminate character of the original question of public policy; but is limited to the relation of the particular action asked to the legal

rights of the person or persons which such action may impair. The most familiar instance of this is the layout of ordinary highways. * * * The question is, does common convenience and necessity require a highway at this place? Is a new highway needed between these termini, to accommodate public travel? And will the proposed scheme meet and supply that requirement? * * * And in this question of common convenience and necessity is included the expense of the proposed highway, and the financial ability of the corporation to meet that expense. * * * So in the statute under consideration the 'public convenience and necessity' sufficient to 'require the construction of such street railway' means a condition existing at the time of the application in respect to the applying railroad, the mode of public travel, the manner in which those needs are to be supplied, and the probable effect of the proposed road upon the whole question of adequately supplying those needs, as well as in respect to the road proposed to be paralleled, that in the judgment of the trier will justify the interference with private rights involved. Railroad companies chartered by the legislature have expended large sums of money in the construction of their roads which are practically wasted unless the road can be used without loss for the transportation of passengers and freight. It is obviously for this reason that the provisions in section 8 were incorporated into the general act, and so a legal right given to existing roads to protection against a certain kind of parallel road, when the circumstances of such road are not shown to be under all the existing conditions of public convenience and necessity."

§ 779. Necessary existing system to be conserved.—Where the choice lay between discontinuing an established street car service which was found to be indispensable and the introduction of motor vehicle service, the court upheld the municipal authorities in refusing to permit the motor buses to operate in the case of *Burgess v. Brockton*, 235 Mass. 95, 126 N. E. 456, where the court said: "The public trustees of the Eastern Massachusetts Street Railway Company gave notice to the mayor and aldermen of Brockton of a proposed discontinuance of certain street railway lines in Brockton because of failure to earn proper return on account of unfair competition of licensees under the ordinance. * * * At these meetings the matter of revoking the licenses of the so-called 'jitneys' was discussed. The sentiment expressed at these meetings appeared to be in favor of the retention of the street railway service. The board of alder-

men, in revoking the licenses, acted in good faith and in the exercise of a reasonable discretion in the interests of the public safety and convenience as they believed, to the end that the mode of transportation which they thought best calculated to serve the entire population of the city might be preserved and maintained. The general convenience of the public was the ground of revocation of the licenses. The 'jitneys' (as the motor vehicles of the petitioners are termed) could not carry all the people. The aldermen, in revoking the licenses and thereby continuing the street railway to the exclusion of the 'jitneys,' honestly acted according to their judgment of the public welfare. It has been settled that the statute, pursuant to the authority of which the ordinance was passed, is valid. Regulation of the operation of vehicles for the conveyance of passengers and the requirement of a license for the use is a lawful subject for regulation by statute or by municipal ordinance. * * * Private property invested in the street railway has been in a sense devoted to a public use. It can not be withdrawn at the pleasure of the investors. * * * It can not be converted to other uses without great waste. Its owners can not be required in general to operate the road at a loss. * * * The petitioners have been licensed to transport passengers for hire. Their investment is not by its nature so irrevocably devoted to that service as is that of the street railway. It is obvious that the situation presents a conflict of interests, where the preponderating convenience of the public to be determined by some impartial tribunal ought to govern. That is the design of the ordinance. * * * Street railways in this commonwealth hold their locations in public ways under a tenure no more secure than a privilege or permit subject to revocation. * * * The street railway is of necessity to a limited extent a governmentally controlled monopoly. It is a quasi-public corporation. It is subject to public regulation."

Before granting a certificate to a motor vehicle line, the commission must determine that the proposed service will promote the public convenience and necessity, which is naturally concerned with the continued operation and maintenance of the existing service. As these questions are largely administrative in their nature, their decision rests primarily with the commission, and the courts will not substitute their judgment for that of the commission, unless it was arbitrary and unreasonable. This principle is established and discussed as follows in the case of *In re Beasley*, 206 Iowa 229, 220 N. W. 306: "This is not saying that in the course of the hearing and determination of the

legislative question the board may not be called upon to act judicially. Judicial questions may arise, such as whether the commission is acting within its constitutional or statutory powers, whether the statutory prerequisites to, and the formalities for, the exercise of its authority are observed and obeyed; whether the constitutional or statutory rights of the parties before it are violated, whether the commission is acting capriciously, arbitrarily, or unreasonably. Decision of these may require the investigation and determination of facts. * * * With respect to the third point that a certificate to a competing carrier should not be granted until at least complaint is made and opportunity to render the service afforded to the operating carrier, we may say that the record is insufficient to show that this, as a judicial question, was presented either to the commission or to the district court, or, if presented, that it was improperly ruled. Under the statutes of other jurisdictions, and the rights held to result therefrom, consideration must be given to carriers already in operation and to their investments therein. * * * As a prerequisite to granting a certificate to a motor carrier, the board must find that the proposed service will promote the public convenience and necessity. Public convenience and necessity are concerned in the operation and maintenance of existing electric railroads and in their ability to furnish the service for which they were constructed. Capital is invested in them as well as in the equipment of motor carriers; valuable properties such as warehouses are built on the line of the electric railroad in reliance upon its permanent operation. Permission to use highways for motor bus transportation may involve inquiries into the construction, maintenance, capacity, and demand upon them. Engineering problems, cost, and revenue are involved. These matters are not only not judicial in their nature, but the courts are not equipped with facilities for, nor their procedure adopted to, their determination. They are properly committed to an administrative board. It is manifest from these considerations that the question presented here is one of administration and not of disputed facts or of existing legal rights dependent on, or resulting from, existing facts. From what has been said it is clear that the record does not present a case of arbitrary abuse of power. The general assembly has not undertaken to transform the court into a revisory or appellant public service commission. No power to take further evidence or to try the case anew from the beginning is given to the court. No power is given to the court, or could be, to render its own independent

judgment of the public convenience and necessity. It is not for the court to determine the wisdom of the commissioner's action or to substitute its own judgment or opinion for that of the commission."

This same court in another case, in defining the duty of the court, decided that on appeals from the action of the commission it should limit its decision to questions of law, and not attempt to weigh the evidence, unless the action of the commission was wholly arbitrary and unreasonable, for as the court said in the case of Application of Waterloo, Cedar Falls & Northern R. Co., 206 Iowa 238, 220 N. W. 310: "The state board of railroad commissioners is a tribunal having broad powers and large discretion in matters relating to and affecting carriers, such as railroads and motor buses. In the performance of its many and varied duties, it is constantly confronted with subjects involving questions, the solution of which requires technical knowledge of rates, schedules, transportation, and the assistance of experts.

* * * The reversal of the district court was put upon the ground that the evidence failed to disclose that the public convenience and necessity required additional facilities of transportation. The question here involved has arisen in several outside jurisdictions. With rare exception, the holding in such cases has been that the review intended was of questions of law only. Such as, Did the commission act without or in excess of its jurisdiction? Is the order complained of without any support in the evidence? Was the action wholly arbitrary and unreasonable? * * * We deem it unnecessary to discuss the evidence further than to say that the record does not disclose that the commission acted arbitrarily and without evidence to sustain its finding. If it had, its act would have been unlawful, and therefore subject to review on appeal."

The purpose of issuing certificates of public convenience and necessity is not for the advantage and benefit of the company requesting them, but is primarily for the public convenience and general welfare which are paramount to other problems, and such certificates will not be issued where the effect would be to create destructive competition and destroy or handicap the existing service, where that is sufficient, because this would hamper rather than serve the public convenience and necessity. This principle is established and discussed as follows in the case of Stark Electric R. Co. v. Public Utilities Comm., 118 Ohio St. 405, 161 N. E. 208, where the court said: "This court has repeatedly held that the purpose of the Motor Transportation Act

is to serve the public convenience and necessity as distinguished from serving the advantage and profit of motor transportation companies; that the public convenience and necessity are paramount to every other consideration; that it is not the policy of such legislation to create destructive competition with existing transportation facilities and thereby decrease or destroy such existing transportation service and deprive the general public thereof, but, on the contrary, is the policy of such legislation to so limit and so certificate motor transportation service as to secure, to the public, service additional to the service which it already has; and that, where the certification will result in depriving the public of an equal or greater existing public transportation facility, certification of a motor transportation company route, will thwart, instead of serve, the public convenience and necessity."

An operator of interstate motor transportation service applying for a certificate to furnish intrastate service is in no better position because it has the interstate certificate, as this was not issued upon the existence of local intrastate convenience and necessity; and where this service is already adequate, an additional certificate will not be issued to the interstate operator. The word "necessity" in this connection is not interpreted literally, and while not synonymous with "convenience," it means that there is no reasonably adequate service for the public generally. This principle is established and clearly discussed as follows in the case of *Canton-East Liverpool Coach Co. v. Public Utilities Comm.*, 123 Ohio St. 127, 174 N. E. 244, P. U. R. 1931C, 196, where the court said: "An operator of an interstate motor transportation service, seeking a certificate of convenience and necessity to operate an intrastate motor transportation service, stands in no more favorable position by reason of his possession of an interstate certificate than he would without such certificate, since his possession of such certificate is not predicated upon the existence of a convenience and necessity. The burden upon such applicant of showing convenience and necessity is the same as though he were making his initial appearance in the motor transportation world. His burden is to show both a convenience and a necessity, and also that his intrastate operation will not be at the expense of existing transportation services, the operators of which are rendering, or are willing to render, reasonably adequate service. The record discloses that all the territory has transportation service. * * * Perhaps it will not do to give to the word 'necessity' its literal meaning and hold that, before a

certificate can issue, there must be an absolute requisite for a motor transportation service; but it must not be wholly devitalized by interpreting it as synonymous with convenience. Necessity, perhaps, in its reference to transportation facilities, may best be construed as contemplating a definite public need for a public transportation service in a territory where no reasonably adequate public service exists. It does not contemplate that every prospective customer may have a nonstop service from the point where he becomes a passenger to the point of his destination, nor that he may have an air line between such points, but only that the public generally, of every territory sufficiently populous to justify the maintenance of a public transportation, shall have reasonably adequate service. The showing in this case did not amount to a showing of necessity, as we interpret the meaning and intention of the legislature in the use of that word, but only amounted to a showing of convenience."

A refusal by the commission to issue a certificate permitting an express agency to continue to render its service by motor vehicles in lieu of railway service, which had been discontinued, was not sustained by the court which indicated that a limited certificate permitting the express agency to continue its service by the use of motor vehicles should have been issued, for as the court said in the case of *Railway Express Agency, Inc. v. Public Utilities Comm.*, 123 Ohio St. 159, 174 N. E. 356, P. U. R. 1931B, 426: "Under the peculiar circumstances developed in this record, we think that the plaintiff in error's application for a certificate should have been granted. Its operation after July 1, 1929, was carried on in good faith and only for the purpose of continuing the same service it had theretofore given the public. The express agency disclaimed any intention of carrying any other goods than such as would be consigned to it for express delivery. However, under the Motor Act, upon grant of a certificate, it would become a common carrier subject to the same liabilities incurred by other motor transportation companies. While it might not be incumbent upon it to seek or advertise for business, still it would be required to accept such as might be offered to it by the general public. Here it desired the operation of a single truck with one round trip each day; this restriction could lawfully be placed upon the operation by the commission, especially as the express agency disclaimed any other purpose than that of carrying on its express service. * * *

Through no fault of the applicant the train service carrying its express shipments was discontinued. Many important shippers

who in the past used applicant's express service are asking its continuance through a grant of this application, and their evidence strongly fortifies applicant's claim of convenience and necessity. Having regard for the various aspects this case assumes, we are of opinion that the commission erred in refusing plaintiff in error's application."

Where the plan of operation of motor vehicles is such as to be a subterfuge or scheme to evade regulation by the commission, the court will sustain the action of the commission in its decision to the effect that the service is such as properly comes under the jurisdiction of the commission, whose orders must be followed if the service is to be continued, for as the court said in the case of *Public Utilities Comm. v. Sebring-Alliance Bus Line*, 35 Ohio App. 101, 172 N. E. 290: "The sole question, therefore, before this court is: Does the operation and the manner thereof of the bus line by the defendant make it a motor transportation company under the provisions of section 614-84 of the General Code of Ohio, so as to subject it to the regulation and control of the utilities commission? It will be noted from the statute indicated that a 'motor transportation company' means any one operating a motor vehicle used for the transportation of persons or property as a common carrier for hire for the public in general over any public highway in the state; the section expressly excludes therefrom any person operating a motor vehicle used for transporting persons or property exclusively within the territorial limits of a municipal corporation, or within the territorial limits of municipal corporations immediately contiguous to each other. * * * It is clear and apparent to this court that the defendant's present plan of operation is but a subterfuge and scheme to avoid the control of the utilities commission, and is for the sole purpose of defiantly and contemptuously ignoring and voiding the orders of the public utilities commission and of the Supreme Court of the state of Ohio previously made in the litigation growing out of the operation of this bus line. * * * It further seems to this court to be reasonable and just that it not only consider the equities of the defendant, and the public in general, but that it is proper to consider the equities of the competing company that is objecting to the action of the defendant in its wrongful operation of this bus line. Its investments and property are rights sacred and deserving of the protection of this court."

To conserve the highways and to protect existing lines of motor vehicle service, with the paramount end in view of secur-

ing the best service permanently, is the policy to be pursued in granting or withholding certificates of public convenience and necessity, for as the court said in the case of *Pennsylvania R. Co. v. Public Utilities Comm.*, 123 Ohio St. 655, 176 N. E. 573: "When public convenience and necessity have been established for the operation of a route, and applied for by one or more applicants, other features must be given consideration; whether a favorable grant to an applicant would create such a monopoly over transportation in the territory as would prevent competition; whether the granting of a new certificate, over the protest of an existing transportation company, would probably result in such ruinous competition as would impair or jeopardize the public service; whether, in case of two or more applicants for a route, all other things being equal, one applicant possesses a much greater degree of financial responsibility than the other; and whether, in the same situation, the operation by one company would create a greater burden upon our public highways than would the operation of other companies applying for the same route. Without citing the many authorities decided by this court touching the regulation of our public highways, it may be said that it has been the established policy of this court to protect existing lines of transportation and to refuse certificates to new operators where the existing lines of transportation adequately furnish transportation to the public; and this is true whether the existing lines be motor transportation companies, interurban companies, or railroad companies; and we think this was also the legislative policy. * * * These reasons lead us to the conclusion that, as between the applications of the White Star Line and the Transit Company, the latter should have been awarded the certificate."

That the operation of sight-seeing buses is not such a service as to constitute the motor vehicle which renders it a common carrier any more than hotel buses, which may be exempted from regulations of common carrier service, is indicated in the case of *Sequoia National Park Stages Co. v. Sequoia & General Grant National Parks Co.*, 210 Cal. 156, 291 Pac. 208, where the court said: "Since the contract made with the federal government in 1926 the defendant operated daily during the season a particular motor type eleven-passenger bus equipped and fitted for mountain traffic. * * * The operation of sight-seeing buses is common in various parts of the state, especially in the southern part of the state, where trips extend to the beach resorts and to places of amusement and recreation. It is therefore not

a new or novel question with the railroad commission. * * * If the defendant should be required to conform to the burden of a common carrier in order to serve its private business enterprise by meeting trains to transport its patrons to its place of business, its livelihood would, to say the least, be seriously impaired. Doubtless it is for this reason that hotel and sight-seeing buses were exempted by the provisions of the statutes of 1927. The same vehicle was used in a dual service, which is not prohibited, and was owned, controlled, and managed by the corporation for whose use it was employed. * * * We have read the entire record, including the transcript of the testimony, and are of the view that the exemptions provided by the statutes are valid and effective."

In the absence of evidence of a need or necessity for motor vehicle service, where railroad service is adequate, and the investment necessary to continue to render the existing service is very great, and no evidence was offered as to the financial capacity of the applicant seeking to give motor vehicle service in competition with the rail service, the court will not sustain the action of the commission in granting a certificate, as is clearly indicated and well expressed in the case of *Commerce Comm. v. Wabash R. Co.*, 335 Ill. 484, 167 N. E. 64, where the court said: "The ability of the corporation to furnish adequate and satisfactory service is a question essential to be determined upon every application for a certificate of convenience and necessity. * * * No finding was made by the commission concerning the financial ability of the appellant to perform the service for which it sought authority, and, indeed, there was no evidence, if it were the province of this court to examine the evidence in the absence of a finding by the commission, upon which a finding could have been made as to the financial ability of appellant to justify the order. * * * The appellant presented no evidence showing a need of bus service between the cities of Chicago and East St. Louis, yet the order of the commission found that public convenience and necessity required such service. * * * The railroads give quicker service than is in contemplation of the appellant, as shown by its proposed schedule. The route to be followed by its buses is not materially shorter than that of any of the railroads. * * * The through traffic between the two cities is well served. The order of the commission was therefore unreasonable in finding that public convenience and necessity required the additional through service. * * * It appeared in evidence that existing carriers had heavy investments

and were able to furnish such additional service as the commission should find that they should furnish."

Where the territory is already adequately served, the commission may refuse to issue a certificate for additional service and, under the statutes of most of the states, it is its duty to do so, as is indicated in the case of *Marion-Lima Transit Co. v. Public Utilities Comm.* (Ohio St.), 180 N. E. 902, where the court said: "The foregoing order of the commission, granting the application, conditioned and restricted as above-indicated, is based upon the decision of this court in the case of *Pennsylvania R. Co. v. Public Utilities Commission*, 123 Ohio St. 655, 176 N. E. 573, and a majority of this court are of opinion that that case is controlling in the instant case. The principles declared in that case are applicable to the facts disclosed by the present record. In that case an intrastate certificate was sought over a route across the state already served by various operators along separate portions of the route. These operators were protestants, contending that no public necessity or convenience required the through intrastate operation and that the public was being adequately served by existing transportation lines in the territory severally occupied by the protestants."

§ 780. Certificate denying additional system as unnecessary and fatal to existing system.—A similar ruling sustaining the established street car system, which was found to be indispensable, and denying independent motor bus lines the right to operate in competition with the existing service was made by the public utility commission in the case of *In re Bridgeport*, P. U. R. 1922B, 193, as follows: "That street railway service in Bridgeport at the present time is an absolute necessity, is generally conceded, irrespective of the number of jitneys and the extent of their operation. The rates of fares at which jitneys are willing to operate, and the rates of fare now charged by the street railway company, make it difficult to reconcile the two forms of service or to maintain a successful street railway service with the rates of fare substantially double those of the jitney service. As a result of the difference in rates, the street railway company is not receiving the number of patrons it is equipped to serve and is not receiving the public patronage which is necessary for its continued existence as a transportation agency in Bridgeport. The principal demand for increased number of jitneys is largely due to the difference in fares. * * * The installation of frequent jitney service might prove a temporary convenience, but

in our opinion would result ultimately in the abandonment of the street railway, with all the consequences of such abandonment upon future public convenience and necessity. With the elimination of jitney competition the street railway should give frequent, adequate and dependable service, and if necessary to avoid delays due to congestion, additional double track mileage or additional turnouts along the single track line, should be installed. Considering the whole situation as herein set forth, the commission is of opinion and finds that present public convenience and necessity do not require additional jitney routes in Bridgeport, or additional jitney operation for the city of Bridgeport, or upon any of the suburban or interurban routes applied for."

The discretion of the commission in granting or denying certificates after a hearing of the interested parties on an application for the extension of a route being operated under an old certificate will not justify the commission in deciding the matter without permitting the applicant to be heard; and an order of the commission issued under these conditions will be reversed, because all interested parties are not only entitled to be notified and to be present at a hearing, but they must be permitted to be heard and to present their case. This principle is enunciated and discussed as follows in the case of *Central Ohio Lines v. Public Utilities Comm.*, 123 Ohio St. 221, 174 N. E. 765, where the court said: "However, the provisions as to the discretion of the public utilities commission to grant or withhold a hearing do not in this instance apply. This was not an application for a new certificate, but was an application under section 614-93 to extend the route under the old certificate. The application, therefore, had to be considered by the commission and governed in the same manner as in the case of an original application. *Central Ohio Transit Co. v. Public Utilities Commission*, 115 Ohio St. 383, 154 N. E. 323. Here the commission did not act without a hearing. It held a hearing in which upon a question of fact it treated statements of counsel as to schedules of protestants' operations in the territory involved as evidence, and then refused the applicant the right to put in its case. The tender shown by the record was adequate to raise the question squarely, stating that 'there are witnesses present * * * whom we desire to call and are not permitted to call because of the action of the commission in sustaining the motion.' The principle is elemental that, upon any hearing, each side of the controversy must be given an opportunity to present its case. The order of the public

utilities commission will be reversed, and the cause remanded to the commission for further proceeding according to law."

Where the weight of evidence shows that the existing service is adequate, the commission has no authority to authorize competitive service but may require any necessary additional service from the existing company, and the courts will set aside an order of the commission for competitive service under such conditions for lack of authority to grant it, as is indicated in the case of *Wilcox Transp. Co. v. Commerce Commission*, 328 Ill. 455, 159 N. E. 788: "While there is some evidence to the contrary, the overwhelming weight of the testimony is that appellee is rendering adequate service. This being true, the commission has no authority to grant a certificate to a competing company. * * * The commission has ample authority, under the act, to require such reasonable additions to the service and such modifications of the route as the convenience and necessity of the public demand, and before it cancels a certificate issued to a public utility already occupying the field, and ready and willing to furnish the necessary service to accommodate the public, it should give the existing utility an opportunity to meet the changed conditions. The record warrants the action of the superior court in setting aside the orders of the commission entered subsequently to July 7, 1926, and its judgment is accordingly affirmed."

Under the well established policy of protecting the existing service from competition where this service is adequate, not only in the interest of justice, but because the public service will be more efficient and the cost more reasonable than under competitive conditions, the court will refuse to sustain the action of the commission in granting certificates permitting competitive service where there is no evidence that public convenience and necessity require service by motor vehicles in addition to the service which is being given by a railway company, especially where this action was taken without any notice to the railway company. This principle is enunciated and discussed clearly as follows in the case of *Chicago R. Co. v. Commerce Commission*, 336 Ill. 51, 167 N. E. 840, P. U. R. 1930A, 385, where the court said: "The question before the commission was whether public convenience and necessity required the operation of motor buses over the routes described in the coach company's petition, and an express finding of fact showing that public convenience and necessity required the operation of motor buses along certain routes and upon certain streets or highways was a condition

precedent to the jurisdiction of the commission to grant a certificate of public convenience and necessity for the operation of motor buses along such routes and over such streets and highways. The order of the commission does not contain any such finding of facts, and it is therefore void. * * * The essence of this proceeding, so far as the appellants were concerned, was to determine the question whether public convenience and necessity required that they be subjected to the competition of the coach company over particular streets in Chicago. They were entitled to notice before the amendment was made, and since none was given, the order making the amendment was void. * * * It is not the policy of the Public Utilities Act to promote competition between common carriers as a means of providing service to the public. The policy established by that act is that through regulation of an established carrier occupying a given field and protection of it from competition the public will be served more efficiently and at a more reasonable rate than if other competing lines were authorized to render the same public service in the same territory. * * * It is in accord with justice and sound business economy that the utility already in the field be given an opportunity to furnish the required service where it offers and is able to do so."

Where the existing motor vehicle service is adequate, the public utilities commission should refuse a certificate for service by additional parties in the interest of the public welfare and for the protection of the existing service. This principle is well established in practice and is often regulated by statutory provisions requiring the commission to refuse to issue certificates for such additional service, as is indicated in the case of *New York Central R. Co. v. Public Utilities Comm.*, 123 Ohio St. 370, 175 N. E. 596, P. U. R. 1931D, 101: "All other points on the proposed route are served by duly certified motor transportation companies so engaged since long prior to the enactment of the motor transportation law, and which operate with ample equipment and furnish efficient service not only from station to station but from store door to store door, and are able, ready, and willing to render such additional service as may be required in the territory, and also to give connecting service and enter into any joint tariffs or other proper arrangements approved by the commission for the interchange of freight such as may be required to meet the convenience and necessity of the public. Such was the finding of the public utilities commission and the record fully warrants that finding. The proposed route is en-

tirely within the state and we regard the fact that some of the freight proposed to be hauled involves interstate shipments entirely immaterial. * * * It is the duty of the commission under the statute in every case to take into consideration other existing transportation facilities in the territory for which a certificate is sought, and where it appears from the evidence that the service furnished by existing transportation facilities is reasonably adequate the commission should refuse the application."

§ 781. Substantial permanent investments conserved to insure continued service.—To a like effect is the holding of the Pennsylvania public service commission in the case of *In re Hauser*, P. U. R. 1922B, 383, where the commission said: "By reason of the large capital investment in rail transportation, some of these companies have continued to operate in the face of an accumulating deficit, rather than to surrender their franchises and scrap their properties, in the hope and expectation that conditions would so change that they would be able to operate at a profit. So long as a railroad or railway company retains its franchise to operate it may be compelled to do so. A motor company, with its comparatively small investment, without suffering any serious loss, can surrender its franchise and cease to operate at will."

In denying a certificate for common carrier service by motor vehicles which would be in competition with existing railroad service, the action of the commission will be sustained where it appears that the rail service is adequate; because the statute requires the commission, before granting certificates for additional service, to find that the existing service is inadequate, and under such statutes the courts may not exclude railroad service because motor vehicle service may seem preferable, for as the court said in the case of *Vander Werf v. Board of Railroad Comrs.* (S. Dak.), 237 N. W. 909: "In reviewing the order under consideration, the only function of this court is therefore to determine whether or not the order is arbitrary or unreasonable. If, after a consideration of the evidence and the law, the order is considered arbitrary or unreasonable, it should be set aside, otherwise it should be sustained. * * * In view of this expressed statutory direction it was incumbent upon the railroad commission in determining the convenience and necessity to give consideration to the existing railroad transportation service furnished the town of Colton and vicinity. The commission in enter-

ing its order denying the application determined that the existing railroad service furnished was adequate to meet the needs of Colton and vicinity. In view of the record we can not say such determination was arbitrary or unreasonable. * * * The question now presented is, 'Rail service being adequate, is the order of the commission arbitrary or unreasonable?' The petitioner maintains that the 'railroads are absolutely a thing of the past,' and asks the question 'Do we want to keep up with the times?' A complete answer to the question asked is to reply that the legislature has foreclosed this court and the commission from acting without giving consideration to the transportation being furnished by a railroad company. The legislature was not of the opinion that 'railroads are absolutely a thing of the past' when chapter 224, Laws of 1925, was enacted, wherein it was provided that 'the board shall give reasonable consideration to the transportation service being furnished or that will be furnished by any railroad.' If 'to keep up with the times' means to leave out of consideration, in determining public convenience and necessity, the service being furnished by any railroad, then this court must remain old fashioned so long as chapter 224, Laws of 1925, exists in its present form. * * * The time has not yet arrived in the development of transportation when it is not essential for a community, which has been served for many years by railroads, to not have at least a portion of the service offered by the railroad. * * * Apart from the legislative direction it is the general rule that a certificate of convenience and necessity should not be granted where there is existing service 'over the route applied for, unless the service is inadequate, or additional service would benefit the general public, or unless the existing carrier has been given an opportunity to furnish such additional service as may be required.' 67 A. L. R. 957. * * * The Supreme Court of Michigan in the case of Rapid Railway Co. v. Michigan Public Utilities Commission, 225 Mich. 425, 196 N. W. 518, 520, has seemingly taken a view different from the general rule, but the reason assigned was the lack of legislative direction. That court said: 'If it be desirable to clothe the commission with the power to prevent such competition by refusing to permit motor vehicles to operate, when the service rendered by the steam and electric roads is adequate to the needs and convenience of the public, we think the legislature should so provide in no uncertain language.' * * * And because of the statute the Virginia court has sustained the commission in granting a certificate where rail service was adequate.

Petersburg, &c., R. Co. v. Commonwealth, 152 Va. 193, 146 S. E. 292, 67 A. L. R. 931. * * * In view of the statutes of this state and the facts here presented, we can not hold that the railroad commission acted arbitrarily or unreasonably in denying the application of petitioner. The order of the board of railroad commissioners is affirmed."

§ 782. **Utah denies needless competition.**—To the same effect the Utah public utilities commission in the case of *In re Streeter*, P. U. R. 1924B, 392, said: "Manifestly, the intent and purpose of this provision of section 4818 (Compiled Laws of Utah, 1917) precludes our granting a certificate of convenience and necessity to an applicant, where, as in the present case, it is shown that there are already two steam railroads, one electric railroad and one automobile corporation operating in the territory to be served, and the present operators in their respective kind of service are found to be capable of and ready and willing to efficiently handle every pound of freight and express offered to them for transportation, between the points applied for by the applicant. Just why the consuming and taxpaying public of this state should be subjected to the maintenance of any more transportation facilities, or to be taxed for the running of needless freight and express trucks over the already heavily burdened and congested highway now under consideration, has not been made apparent to the commission by the evidence adduced in behalf of the applicant in this case. If, as contended by the applicant, competition in this class of service, under the facts and circumstances disclosed, enures to the benefit of the public as a whole, then the state highways ought to be thrown wide open to all who may desire to operate over them for hire, provided, of course, they are capable and have suitable equipment."

The court from this same jurisdiction later reiterated this in the action of its public utilities commission in denying a certificate for additional transportation service which would create unfair and destructive competition, for the reason that the present service was sufficient, and additional service would not be in the public interest, or serve the cause of justice to the existing companies. In the course of its opinion to this effect, the court said in the case of *Gilmer v. Public Utilities Comm.*, 67 Utah 222, 247 Pac. 284, P. U. R. 1926D, 457: "In view of the foregoing provisions, when considered in the light of the purposes of the Public Utilities Act, as they must be, there can be but little if any doubt respecting the right and power of the

commission to regulate and control the operation of auto stage lines or other motor vehicles which use the public highways and streets for the purpose of transporting either freight or passengers as common carriers. Nor is there any doubt that the state, in the exercise of its police or governmental powers, may exclude all vehicles that are being used or operated for the purposes aforesaid from the public streets or highways altogether.

* * * Pond, in the third and last edition of his excellent work entitled *Public Utilities*, discusses the subject of regulation of public utilities by the state, through public utility commissions, at considerable length. In view that Mr. Pond covers the very questions involved on this review, we take the liberty of quoting and adopting some of the language used by the author. In section 723, in speaking of the adjustment of the service of motor vehicles operating as common carriers, the author says: "The proper adjustment of the service of motor vehicles operating as common carriers to that of rail and electric carriers is of the greatest importance and requires early attention and practicable and equitable solution." * * * In sections 754 and 755 the author lays down the following propositions: * * * [See section 754, paragraph 1 and section 755, paragraph 1.] In view of what has been said, therefore, there can be no doubt respecting the state's right, when acting through its authorized agent, the Public Utilities Commission, to do precisely what the commission ordered to be done in this case. Moreover, it requires but a moment's reflection to convince the reasonable mind that the foregoing statements are as reasonable as they are just and practical. * * * The Utilities Act was conceived to prevent just such unfair and destructive competition, and the commission is the agency that is created with power to regulate and to adjust such contingencies when they arise. To a greater or lesser extent such seems to be the condition which prevails in this case."

§ 783. **Limitation of public necessity.**—While fully recognizing the importance of motor vehicles as common carriers in meeting the demands of the public and rendering a service that is highly desirable if not actually necessary under our present-day systems of transportation, the public service commission of Vermont followed the principle already set out of controlling and coordinating the existing systems, and of granting permits to other systems only after the established ones failed to meet the public demands. In the case of *In re James*, P. U. R. 1923E, 857, the commission, in refusing to consider the issuance of a permit

to operate a motor bus line in the absence of evidence showing the present service inadequate, in order that it might determine the question of the necessity of the additional service offered, said: "The motor vehicle has revolutionized local travel and the public motor bus for the carriage of passengers and parcels has become a necessity to many communities not otherwise adequately served by public conveyance of any kind; but there are certain localities in the state where the traveling public is already so amply provided with other forms of conveyance that any new service, like the bus service, is uncalled for. There are also localities where several bus lines may seek to operate where the entire carrying business could be fully supplied by a less number. The motor bus operates upon the highway. The state of Vermont and the federal government have expended large sums of money in order to prepare the proper roadbed to meet the new conditions of travel which the motor vehicle has called into being. This outlay, and the highways which have been provided by these means, are used by the motor bus in common with other motor vehicles and horse-drawn vehicles without expense, save the small license fees which it pays to the local and federal governments. Travel upon the principal highways of the state has increased to such an extent, that, in many places the highways are worn out so rapidly that it has become necessary to expend sums heretofore undreamed of for the construction of permanent highways of a stability sufficient to sustain the accumulated business, and the crowding of traffic in the principal places of business has become such that it is necessary to station traffic officers and set up monuments in the highways to regulate and control the direction and speed of the different kinds of vehicles. * * * The common carrier has always been considered subject to legislative control and regulation, having reference to the needs of the public, and when the legislature placed motor buses within this class it must have intended to subject the newly constituted common carriers to the same control and regulation as other members of the same class. It seems to us that the members of the legislature in passing this act did so under the belief that the time had come to determine in a formal way to what extent our highways should be used by the business under consideration, and to limit that use to the public need."

Where there is no demand for additional service by motor vehicles and no complaint that the existing service is inadequate or insufficient for public necessity, the commission is entirely

justified in refusing a certificate for such additional service, for as the court said in the case of *State v. Department of Public Works*, 141 Wash. 168, 250 Pac. 1088, P. U. R. 1927C, 305: "There was no charge or complaint that either one or more of the companies already in the field were giving inadequate service. A large number of protests were filed against the application by parties who appeared at the hearing before the department, including all the transportation companies now serving the territory. Upon the hearing the department of public works found that the territory which the appellants proposed to serve is already served by other certificate holders under the law; that no complaint had been filed with the department to the effect that the service now being rendered by certificate holders over the route is inadequate or insufficient for the public needs; and that the department has made no order relative to rates, facilities, or service which the certificate holders failed or refused to obey. Upon the hearing and findings an order was entered by the department denying the application."

Where there was no showing that the proposed service by a motor vehicle line would be an improvement over the existing rail service, or that public necessity required this additional service because of the inadequacy of the present service, an order of the commission refusing a certificate for such additional service will be sustained as reasonable and lawful, as is indicated in the case of *Chicago, Rock Island &c. R. Co. v. State*, 123 Okla. 190, 252 Pac. 849: "The orders of the corporation commission must be reasonable and lawful, based upon findings of fact supported by competent evidence, such finding being conclusive on this court, unless manifestly against the evidence, and the question whether they meet the requirements is subject to review on appeal. * * * No showing was made that the service to be rendered by the proposed bus line would be a marked improvement, or an improvement at all, over the existing mode of transportation furnished by protestant. No evidence was produced to show the public would be inconvenienced by refusing to permit the bus line to operate, and that the inconvenience would be so great as to amount to public necessity. To warrant the licensing of additional public utility for transportation purposes, it must appear that the present serving facilities are inadequate and inconvenient to the traveling public, and that the proposed facilities will eliminate such inadequacy and inconvenience."

The public interest and benefit, and not the private advantage of the particular common carrier, is the chief purpose and the

controlling motive in determining the right of motor vehicles to operate for hire on the public highways. As competition is not generally desirable and ruinous competition in itself is never to be preferred, the general policy of the courts is to sustain the action of the state or its commission or municipality in denying certificates for additional service, unless there is an urgent public need for it, without which the public generally would be materially inconvenienced or handicapped in the pursuit of business or pleasure. This principle is clearly established and discussed as follows in the case of *Chicago, Rock Island &c. R. Co. v. State*, 126 Okla. 48, 258 Pac. 874, P. U. R. 1928A, 255, where the court said: "The legislature is not interested in the motor carriers, except in so far as they desire to use the public highways for private gain, and to serve the public. The public highways, of course, are built for the benefit of the public. So the principal party to be benefited by the act is the public. By the act it is not intended to promote competition between and among common carriers, but, on the other hand, it is intended that common carriers, railroads, and motor carriers alike should receive a fair measure of protection against ruinous competition, with a view that the public may be better served. It has never been the policy of legislatures to enact legislation for the benefit of individuals or classes of individuals, except so far as the same would directly affect the public interest. * * * In the first part of the definition it is said that 'necessity' is not used in the sense of being essential or absolutely indispensable, and in the last part it is said that the inconvenience of the public occasioned by the lack of motor carrier transportation should be so great as to amount to a necessity. If the word 'necessity' in the last part of the definition is used in its ordinary sense, the definition is too harsh. * * * Necessity, as here used, could not mean indispensable which is the more common meaning of the term. While a condition might arise where motor transportation of this sort might be indispensable to an individual or several individuals, such could never be the case with the public. A much less urgency will meet the requirements. As used in this connection, 'necessity' means a public need, without which the public is inconvenienced to the extent of being handicapped in the pursuit of business or wholesome pleasure, or both—without which the people generally of the community are denied, to their detriment, that which is enjoyed by other people generally, similarly situated. * * * To set aside an order of the corporation commission as being unjust, unreasonable, or arbitrary,

it is not sufficient for this court to think the order unwise. It is within the province of the corporation commission to pass upon the wisdom of the proposed undertaking by a public utility. That commission is presumed to be peculiarly experienced and fitted for that purpose, and, having seen and heard the witnesses, and being in possession of data and information not obtainable by this court, it would be unwise to give the orders of the commission any less recognition. To do otherwise would place the ultimate decision in every case with this court, and substitute the findings of this court for that of the corporation commission. * * * There being some evidence reasonably tending to support the order of the corporation commission, and having examined appellant's evidence, we are unable to say that the prima facie presumption of the reasonableness and justness of the order of the commission has been overcome. The order of the corporation commission is affirmed."

§ 784. Reasonable need constitutes public necessity.—A practical limitation on this principle and particular subject is well illustrated in the finding of the New York public service commission in one of the earlier cases of *In re Troy Auto Car Co.*, P. U. R. 1917A, 700, where the commission said: "There is no doubt that the operation of the applicant is in direct competition with that of the traction company throughout the entire route. It can by no means be assumed that every passenger who uses the stage route would use the street cars if a stage route did not operate, but it is safe to assume that in the absence of the stage route a very large majority of its patrons would use the street cars. It would seem, furthermore, that the number of cars operated by the traction company in the competitive district is sufficient to carry the traffic, and it would seem a priori that the street car operation on a headway varying from five minutes to less than two minutes would invite passengers away from automobile transportation on a headway of fifteen minutes, even if a large portion of the passengers should be required to walk a greater distance in order to reach street cars. In spite of this theoretical consideration, the fact confronts us that during fifteen months' operation of the stage route its buses carried 770,852 passengers. This is an absolute demonstration that many people of the neighborhood concerned regard the stage route as a superior convenience. * * * Taking the phrase as an entity, it does not mean to require a physical necessity or an indispensable thing. It is dangerous to undertake to formulate

abstract definitions in deciding a concrete case, but we take it that for such purposes as are involved in this and similar applications a public convenience and necessity exists when the proposed facility will meet a reasonable want of the public and supply a need, if existing facilities, while in a sense sufficient, do not adequately supply that need. This case is unusually close, but on the whole we are of the opinion that there is such a divergence of the routes and so much greater convenience afforded by the stage route that it may fairly be said that it supplies a want of the public not already adequately met."

While a reasonable need for motor vehicle service may constitute a necessity for it, the court will sustain the action of the commission in granting a certificate for this additional service to the existing rail service, rather than to an independent concern; indeed, this is the policy in many jurisdictions, and there is good reason for the practice, as experience has demonstrated in a number of cases that it not only tends to protect the existing service, but provides a complete, consolidated service, which is for the public benefit and in the public interest. This principle is established and discussed as follows in the case of *North Bend Stage Line, Inc. v. Department of Public Works*, 162 Wash. 46, 297 Pac. 780, P. U. R. 1931C, 484: "As to the present rail service, the proposed motor service will be largely a substitute therefor. In view of the present motor mindedness of the public with reference to short distance service, which, we think, is so well known as to be judicially noticed, it seems to us that it is highly probable that the proposed motor service by the railroad company will be regarded by the public as more attractive and more convenient than the present rail service. There is, of course, some room for arguing, under the facts here appearing, that there is no pressing necessity for the proposed motor service in the strict sense of the word 'necessity,' but that is not the test in cases of this nature. * * * We have many times held, in substance, that the decision of the department as to the public convenience and necessity of a proposed public motor service, and as to territory already served, will not be disturbed by the courts unless there clearly appears to be arbitrary action therein on the part of the department. * * * In connection with the protest of the stage line against the granting of a certificate to the railroad company, the stage line asked for a certificate authorizing it to furnish service between North Bend and Cedar Falls. There being at present no passenger or express service between those places other than the present railway service, and

the stage line in no event having any preference right to furnish such service, it seems clear to us that the manner of granting a right to furnish motor service to one or the other became a matter of discretion with the department, as to which there is no cause for interference by the courts."

The term "necessity" indicates that there is a public need without which the public will be handicapped in their business or pleasure, and in the changing conditions and demands of the day, a decision of the commission, acting within its discretion, in granting a certificate for motor vehicle service to supplement the existing rail service may be sustained by the courts, where a reversal of the action of the commission would be simply a substitution of the judgment of the court for that of the commission. This principle is established and discussed as follows in the case of *Atchison, Topeka &c. R. Co. v. Public Service Comm.*, 130 Kans. 777, 288 Pac. 755, where the court said: "These findings bring the case within the generally accepted meaning of necessity, not an absolute need nor a need of a few individuals, but a need of the public as well as an inconvenience of the public. 'The word "necessity" means a public need, without which the public is inconvenienced to the extent of being handicapped in the pursuit of business or wholesome pleasure, or both—without which the people generally of the community are denied, to their detriment, that which is enjoyed by other people generally, similarly situated.' *Chicago, R. I. & P. Ry. Co. v. State*, 126 Okla. 48, syl. par. 1, 258 Pac. 874. This does not mean that the rail service as such is in any way inadequate as the trial court found, but an adequate rail service may not and can not always afford an adequate general transportation service. * * * Convenience and necessity consist largely in the changing conditions and the demands of the times, the same as there arose years ago for railroad facilities as against existing canal and river transportation facilities. We have no difficulty in finding sufficient evidence to fully support the findings of the trial court in general and also the one where the finding of the commission is so supported and approved, and we concur with the trial court in the conclusions of law justifying the commission in the issuance of the certificate of convenience and necessity. 'In the granting or withholding of certificates of convenience, no justiciable question touching confiscation of property or impairment of vested rights can well arise. Time and again this court, in consonance with the prevailing attitude of the courts throughout the country, has declared that it will not substitute its judgment for that

of some administrative tribunal created by legislative authority for dealing with matters of nonjudicial character.' *Kansas Gas & Electric Co. v. Public Service Comm.*, 122 Kans. 462, 468, 251 Pac. 1097, 1099."

The necessity to be considered in issuing certificates for motor vehicle service is not only the present needs, but those of the future, so far as they may be anticipated in the light of the progress of the community to be served; and an order of the commission based on these considerations, granting a certificate, will be sustained by the court whose judgments in such matters should not be substituted for that of the commission, unless arbitrary or unreasonable, as is indicated in the case of *Campbell v. Illinois Commerce Commission*, 334 Ill. 293, 165 N. E. 790, where the court said: "Orders of the commission are entitled to great weight, and can be set aside only if arbitrary or unreasonable or in clear violation of a rule of law. Courts should review or interfere with them only so far as necessary to keep them within their jurisdiction and protect constitutional rights. (People ex rel. New York & Queens Gas Co. v. McCall, 219 N. Y. 84, 113 N. E. 795, Ann. Cas. 1916E, 1042.) The law does not authorize the court to put itself in the place of the commission, try the question anew and substitute its judgment for that of the commission. The court should not usurp legislative or administrative functions by setting aside a legislative or administrative order on its own conception of the wisdom of it. * * *

The necessity to be provided for is not only the existing urgent need, but the need to be expected in the future, so far as may be anticipated from the development of the community, the growth of industry, the increase of wealth and population and all the elements to be expected in the progress of a community. * * *

A careful consideration of all the evidence impels to the conclusion that the bus company is not only a convenience but a necessity, in the sense the law imputes to the term."

This same court, however, in a later case refused to sustain the action of the commission in granting a certificate of convenience and necessity for the purpose of providing transportation of freight by motor vehicles between several communities, only one of which was not then being served by one or more railroads. As the finding of the commission failed to specify sufficiently to enable the court to review their action in issuing the certificate for additional service by motor vehicles, because present facilities were not adequate or sufficient for the public

convenience and necessity, the court decided that the order should be reversed, speaking as follows in the case of *Kewanee & Galva R. Co. v. Commerce Commission*, 340 Ill. 266, 172 N. E. 706: "The order here involved purports to grant a certificate of convenience and necessity to operate a freight transportation line between nineteen different communities. Appellee's petition shows that only one of these communities is not now served directly by railroad transportation and several of them are served by more than one rail carrier. The findings made by the commission express a mere conclusion that the present facilities for the transportation of property between all these communities are inadequate and insufficient for the convenience and necessity of the public and that public convenience and necessity require the operation of motor vehicles for the transportation of property between said communities. These findings are not specific enough to enable the court to review intelligently the decision of the commission and ascertain if the facts on which the commission has based its order afford a reasonable basis for it. * * * The judgment of the circuit court of Henry county is reversed and the order of the commerce commission is set aside."

What constitutes a reasonable need or a public necessity for common carrier service rendered by motor vehicles is a question of fact for the state commission to decide in its own discretion in each particular case; and where its decision is not arbitrary or unreasonable, under the evidence and the facts of the case, the court will sustain it. Public convenience being the paramount consideration, a certificate for such additional service should not be issued unless there is a real need for the service, based upon public convenience and necessity. Where, however, there is a substantial demand for motor bus service by the public, although there may be adequate railway transportation service available, the tendency now permits the granting of certificates for this comparatively recent form of transportation under proper regulation and control. The courts recognize the law of the survival of the fittest, and, while stage coaches and canals as transportation agencies were forced to give way to railways and interurbans, these in turn are now being challenged by motor vehicles and airplanes; and it does not yet appear what shall constitute the major transportation agency, although each now serves a special field and will probably continue to divide the service. This general principle and the various aspects of its application to present-day and prospective situations is discussed as follows in the case of *Petersburg, Hopewell &c. R. Co.*

v. Commonwealth, 152 Va. 193, 146 S. E. 292, P. U. R. 1929C, 235, where the court said: "In any appeal from a judgment of the state corporation commission, it is to be remembered that its findings are to be treated as prima facie just, reasonable, and correct—made so by express constitutional mandate. * * *

If we were to concede, for the sake of argument, that the operating income of the electric line would materially decrease, this would not of itself be sufficient to warrant any modification of the commission's order. Whatever may be the policy of the interstate commerce commission, Virginia has seen fit to neither curtail nor forbid competition, between transportation companies, and this was the law when the electric line was built. Investors took their chances. The only limitation on competition is that written into the Motor Vehicle Law, chapter 161, Acts of the General Assembly of Virginia 1923 (Extra Session), p. 195. There, in section 3, new permits are forbidden when public convenience and necessity are already reasonably served. Public convenience is always the paramount consideration. For unnecessary duplication of transportation facilities, the public ultimately pays. 'Shoestring' competition, in the end, hurts everybody. * * *

Its straits are due indirectly to the increasing competition of private cars, which can be neither regulated nor controlled. Every older form of transportation has felt its pinch. The promise of relief depends upon the growth of Hopewell, to which easy flow of traffic must always in some degree contribute.

* * * The commission in this case has thus used its discretion, and took into consideration the existence of a rail carrier, and granted a certificate limited to three round trips daily.

* * * When more convenient and adequate service is offered to the public it would seem that necessity requires such public convenience should be served. * * * The ability to carry in some manner all who apply for passage is not necessarily the touchstone. It was pointed out in the International Bus Corporation case, P. U. R. 1927A, 346, that it is sufficient if there is a public demand for bus service in preference to other means of transportation. It was already easily possible to carry from Buffalo to Niagara Falls all who wished to go, and the controlling consideration was public preference for bus service. When people generally wish to travel in this way, they should be permitted to do so, and it is no sufficient answer to say that other carriers, in other ways, stand ready to give the necessary service. That many people do entertain such preference is a matter of common knowledge. Bus lines parallel almost every railroad in

the state, and have taken over much of their local, and some of their long-distance traffic. * * * We have to concede that, in industrial development, the law of the survival of the fittest is not to be gainsaid. Stage coaches and canals were in many instances a total loss, and made so by railroads, which in their turn clashed with interurban electric lines, and now both are facing the automobile in its varied forms. * * * Should the time come when airplanes are preferred by a substantial part of the public, this preference, in its turn, will have to be heeded. They, too, will have then become a necessary public convenience, not to be put aside because buses can carry all who wish to go. * * * After all, it is to be remembered that these matters are peculiarly within the province of the state corporation commission. Among its other duties, it was vested with the supervision of transportation by common carriers and vested also with wide discretion. Its judgments are presumed to be correct, and that presumption in this case has not been overborne."

§ 785. **Public interest proper limitation of monopoly and competition.**—In the case of Gray's Petition, P. U. R. 1916A, 33, the New York commission defined its position and indicated the limitations which it placed on the principle of protecting existing transportation systems against the introduction of new ones, especially motor buses in their relation to established street car systems, so long as the public is provided with proper service. In the course of its finding in this case the commission considered the purpose and underlying principle of commission control as follows: "But every witness insisted that the projected motor line, if established, would add greatly to the convenience of thousands of residents of New Rochelle, in the case of many of whom the establishment of such a line was an absolute necessity if they were ever to enjoy any real transportation facilities at all. Without regard to the effect it might have upon the business of the trolley company, representative citizens from all parts of New Rochelle expressed themselves as unqualifiedly in favor of the establishment of this new motor bus service. From all of which it will be seen that in this New Rochelle case we have a very typical situation indeed to deal with. * * * In other respects we do not consider that these routes really compete with the existing trolley routes at all—at least not to the extent of violating any right which the railroad company has to protection at the hands of this commission against unnecessary and wasteful competition. That it, and all companies similarly situated, are

entitled to such protection up to a certain point, is a fact beyond any possible question. It was one of the wise and just provisions of the Public Service Commission Law to vest in the commissions requisite authority to prevent wasteful and unprofitable competition between privately-owned enterprises engaged in any public utility field. The reasons for doing this were obvious. The people of New York State in their collective capacity have not as yet seen fit to engage largely in any form of government-operated utility enterprise. Individual courage, energy, foresight, and a willingness on the part of private investors to risk large sums in bringing modern conveniences within the reach of all men,—these have been the only agencies through which, speaking generally, it has hitherto been possible for the people of the state of New York to enjoy the benefits attaching to such necessities of modern life as improved transit, lighting, telephonic, and telegraphic facilities. Great financial hazard to the promoters of privately-owned public utilities mark the pioneer period of nearly all these enterprises. * * * Doubtless, therefore, when it passed the Public Service Commissions Law, the legislature included among its provisions the one we are here discussing very largely from a sense of fairness to the private interests already engaged in these fields of work. But the chief consideration must have been a realization that, without some such protective provision in the law, the public itself would be the ultimate sufferers from ill-regulated and wanton competitive conditions. It was plain that under such conditions none of the competitors in any given field could hope to enjoy the degree of financial ease and prosperity which in the long run is absolutely essential if good service is to be given. After the money first invested in launching a public service enterprise has gone, the only condition upon which more money can be obtained is that the enterprise shall be a financial success. * * * It was not the intention of the legislature to forbid all competition between utility companies. That is made perfectly clear by the wording of the law. And certainly it was not intended, either, to place the public service commissions in the position of apparently preventing the people of any locality from enjoying, to the fullest extent consistent with the general good, all new improvements and conveniences as fast as these might appear. * * * We are unable to accept the view that, merely because it is now possible for these people by walking a certain distance to use the trolley, they should forever be debarred from the benefits of more immediate and convenient transportation. We have a feeling, too, that the widely

differing points of view which people have upon the question whether traveling in a motor bus is as pleasant as traveling in a trolley, or vice versa, is a relevant consideration for us to give at least a little weight to in determining a matter of this kind. The two methods of transportation seem to appeal, loosely, to different publics. * * * Still, in the case of routes Nos. 3 and 5, we have somewhat reluctantly reached the conclusion that we should be violating the spirit and intent of the Public Service Commissions Law if we issued the certificate of convenience and necessity that is asked for. These routes parallel the trolley, upon the same streets, practically through their entire length. * * * And to permit it would be to compel the existing street railroad company to meet competition of a kind which would pretty certainly cripple it, and which might (other factors contributing) inflict irreparable injury upon it. * * * Broadly speaking, what must guide the commission in all such cases is an enlightened view of what will best, in the long run, serve the public at large."

That the public good and not the private advantage of the individual is the proper basis for actions by state commissions in determining matters of policy and deciding between the rights of applicants for certificates to render motor vehicle service for hire on the state highways is indicated in the case of *Spokane Northwest Auto Freight v. Department of Public Works*, 148 Wash. 61, 268 Pac. 138, for as the court said: "Primarily these controversies should be determined with regard to the greatest good to the greatest number of people and in this case, upon the whole record, it can not be held that the trial court should have found and determined there was evidence of arbitrariness on the part of the department affecting the rights of the appellants. Section 6390, Rem. Comp. Stat., cited by appellants, is not applicable here. It covers cases where applications are made for certificates to operate in territories already served by certificate holders under the act. * * * In the present case, as we understand the record, the appellant auto freight company has not at any time operated a freight service north of Hunters to Kettle Falls nor made any application for a certificate to render such service nor manifested any willingness to do so until the present time, while the respondent auto freight company did formerly express its willingness to go on to Kettle Falls and made a prior application for a certificate to do that service. These matters, however, are incidents in the consideration of the present applications which

the department together with all other evidence in the case manifestly had in mind in entering its order."

§ 786. Effect of dispensing with state control in New York.—The highly important and exceedingly practical experiment of the state of New York in attempting to dispense with state control over local motor vehicle transportation problems in their connection with the established street railway systems is directly in point, and may well serve other jurisdictions in the course of their solution of the problem. Prior to 1915 motor vehicles operating in municipalities as common carriers were required to secure the consent both of the state and local authorities, but from 1915 to 1919 the consent of the state was not necessary. The chaos and financial difficulties resulting from this change in the policy of regulation of local motor vehicle traffic is discussed at length and the reasons for returning to the former policy of requiring state as well as local consent to such operation are set out in the case of *Niagara Gorge R. Co. v. Gaiser*, 109 Misc. 38, 178 N. Y. S. 156, P. U. R. 1921C, 636, as follows: "As the section read prior to 1915, the certificate of the commission was necessary for bus lines operated over state routes or state highways outside of the city, and the legislative intent to return this jurisdiction is evident upon a reading of the 1919 amendment. The amendment of 1915 had subjected the suburban railways of the state to such competition, resulting in what is generally known by communities to be practical bankruptcy, and almost universal applications for increases in fares; and undoubtedly in recognition of this situation, and of the inequity of permitting competing bus lines to use, without license fee or public service regulation, the highways and streets, for which in many instances the railroad companies had been required, by the terms of their franchise, and under the general Railroad Law, to pave, the law was restored in its general features to that of 1913, and the option was given every village and town to bring itself within the provisions of the amended section requiring local consents and certificates of public convenience and necessity from the public service commission. * * * The legislature has clearly recognized the necessity of vesting in the public service commission authority to pass upon the question as to the convenience of and necessity for such competing lines, and the power to supervise and control their operation. Unless defendant has come under the jurisdiction of the public service commission, he may so operate that his competition will make plaintiff's operation impossible, because of the financial loss resulting, and thereby the service

guaranteed to the public through the supervision of the plaintiff by the public service commission may be destroyed. * * * The amendment thus added to the bus lines operated in cities, and which by section 25 were made common carriers, who must obtain certificates of public convenience and necessity, such bus lines as compete with other common carriers are required by law to obtain the consent of local authorities of towns and villages."

§ 787. **Limitation on competitive motor vehicle systems.**—This commission consistently imposed the same rule as to competing motor vehicle lines among themselves, as has been shown it followed in cases of such proposed new lines with established electric or steam lines, and for like reasons—to conserve investments already properly made and to secure the best service for the public, which would be lasting and at the most reasonable rates. In its holding in the case of *Scott v. Latham*, P. U. R. 1921C, 714, the New York commission said: "It is the policy of this commission to prohibit competition in bus lines, as it is its practice to prevent other competition among common carriers. It is the theory of the law, which this commission supports, that one carrier only should operate, subject to regulation as to all matters, and that thereby the best interests of the public are served. * * * Without considering the minor matters, his time of departure from the different points on the route tends very materially to withdraw patronage from the petitioner. For two of his runs, his hours of departure are advertised to leave at times shortly in advance of the Scott schedule, which has been maintained by Scott and his predecessors for three years at least. * * * This method of conducting the business is, of course, unseemly and unnecessary. It is in opposition to the public interests which would be much better served if the buses arrived at distinctly different times and thus accommodate parties desiring to make the trip at various hours of the day. * * * In any event, the competition which the petitioner has experienced by reason of the granting of the certificate to Latham is directly contrary to the theory of the law, as of late uniformly interpreted by this commission, and if Latham can not profitably conduct his operations along this line without this unreasonable and disastrous competition with Scott, it would be better all things considered, and fairer to the previously established carrier and the public, whose ultimate interests can not be served 'by cut-throat competition in public service' that Latham cease operations altogether."

Public utility commissions are limited not only in granting certificates for additional service to other concerns, but, when not in the interest of the public welfare and as a protection against ruinous competition, they may not permit additional service to be installed by existing lines already serving the same territory, for as the court said in *Southside Transp. Co. v. Commonwealth*, 157 Va. 699, 161 S. E. 895: "From this statute, and from our decided cases, it appears to be the plain policy of the state to protect motor vehicle carriers, in territory already covered by them, from ruinous competition, subject, of course, to the paramount interest of the public. * * * The matter was in the sound discretion of the commission, whose judgment must be accepted as just and reasonable. It is true that the statute gives to a certificate holder the right to furnish additional service over a route already occupied by it when such service is necessary. Both of these lines run for a mile out of Petersburg over the same road, but the franchise given to the Hopewell Company forbids its doing business along this duplicated line. And if it did not, this provision should be reasonably construed. A permit to operate buses between Norfolk and Bristol should not be denied because another company is already in service between Roanoke and Salem."

§ 788. **Dual control of city and state.**—That no motor vehicle line can be established in the streets or highways in the state of New York unless a certificate of convenience and necessity be secured from the state and the necessary local consent obtained as required by the statutes of that state is well stated, and the leading cases on the subject are fully reviewed in the case of *United Traction Co. v. Smith*, 115 Misc. 73, 187 N. Y. S. 377, P. U. R. 1922A, 643. In granting an injunction in favor of an established carrier against a proposed new line which had not secured such consent and which was operating in direct competition with such existing system the court said: "One who operates a motor vehicle line within a city without first obtaining the consent of the municipal authorities, and without thereafter procuring a certificate from the public service commission as to the necessity and public convenience of such business, violates the above statute. * * * No further citation of authorities is needed to demonstrate that the plaintiff is entitled to the injunction sought herein. It seems desirable, however, in view of the multiplicity of similar instances in which the statute in question is being violated in this community so openly and continuously that the court may take judicial notice of it, that attention should be called to

the fact that failure to comply with such statute is a violation of the Penal Law (Consol. Laws, c. 40)."

§ 789. **Power of municipality to own or operate motor vehicle system.**—That the city of New York lacks the authority to operate motor vehicle lines and that if it had such authority it would not have the right to operate such transportation systems except in accordance with the general statutory regulations requiring state and local consent is the effect of the decision in the case of *Brooklyn City R. Co. v. Whalen*, 111 Misc. 348, 181 N. Y. S. 208, affirmed in 191 App. Div. 737, 182 N. Y. S. 283, affirmed in 229 N. Y. 570, 128 N. E. 215, where the court said: "The plaintiff owns and operates lines of surface cars in the city of New York. It seeks an injunction restraining the defendant from operating certain automobile bus lines that are now being maintained. The operation of the bus lines was authorized by the board of estimate of the city of New York. They run virtually parallel with certain of the car lines operated by the plaintiff. That they are directly in competition with the plaintiff is apparent. * * * The provisions of the Transportation Corporation Law mentioned bring the owners and operators of a bus line within the definition of the term 'common carrier,' as used in the Public Service Commissions Law (Consol. Laws, c. 48, § 2, subd. 9), and require that a certificate of public convenience and necessity be obtained, after the consent of the local authorities of the city has been secured, following a public notice and hearing. * * * Bus lines maintained and operated by private individuals or corporations come within the provisions of the Transportation Corporations Law and the Public Service Commissions Law already mentioned. They can not be operated without obtaining the certificate of public convenience and necessity and complying with the other requirements. * * * But, if it could be held that the bus lines in fact were being operated by the city, the result would be the same. Their operation would still be illegal. Municipalities are without authority, unless it is expressly conferred by the legislature, to operate railroads or bus lines or public utilities of any kind. * * * The Home Rule Act plainly does not give any specific authority to the city to become a common carrier. * * * But, if that act gave the city the right to become a common carrier, its right to operate railroads or bus lines would have to be exercised under the provisions of the general laws of the state regulating such matters, and those provisions are the ones already referred to. The city has in no respect complied with such requirements."

§ 790. **Practice in District of Columbia.**—The extent to which motor vehicle lines have been established and the principles under which they are permitted to operate in the city of Washington are indicated in the holding of the public utilities commission in the case of *Washington R. & Electric Co. v. Washington Rapid Transit Co.*, P. U. R. 1922C, 754, as follows: "Motorbus transportation has become an important question in the District of Columbia, evidenced by the fact that twenty-six different individuals and companies using eighty-five vehicles are now operating under authority of the commission, and that there are pending five applications for additional lines. The commission believes that motorbus lines may render a service to the public and that they should be authorized whenever the public convenience and necessity justify. So far as the safety of motorbus transportation is concerned, the commission desires to record its opinion that one-man street railway cars, with regard to which there has been so much public clamor, are safer and more convenient than one-man motor buses. The commission believes, moreover, that where additional transportation facilities are needed, they should be furnished by existing transportation agencies, either street railways or motorbus lines, rather than by the licensing of new companies, particularly where local transportation is necessary. It has followed this course in the past and will continue that policy. The motorbus route involved in this case will furnish a direct service between points in the district now reached only by more circuitous street railway lines, and when operated in conjunction with the motorbus line of the same company already authorized to run on Massachusetts avenue from Union station to Sheridan Circle, will provide a much needed cross-town service between the east and west sections of the city. The commission is of the opinion, therefore, that the Washington Rapid Transit Company should be permitted to proceed with the establishment of the route in question."

A regulation of the public utilities commission of the District of Columbia, requiring the owner of a taxicab to give a bond or a statement showing his financial responsibility as a condition of his securing a license, was set aside as being beyond the power of the commission to require, in the case of *Patrick v. Smith*, 45 Fed. (2d) 924, where the court said in part as follows: "The appellee, as plaintiff below, brought suit to enjoin the public utilities commission of the District of Columbia from enforcing a certain regulation adopted by it, whereby he would be required to furnish a bond or indemnity insurance or a statement of financial

responsibility in order to secure a license to operate his taxicab within the district. It is conceded that the taxicab was to be operated as a common carrier of passengers for hire; and that appellee was denied a license to operate it within the district unless he complied with the regulation aforesaid. The controlling question in the case is whether the commission possesses the lawful authority to make and enforce such a regulation. * * * We are of the opinion that the commission exceeded the powers granted to it by the act in promulgating the regulation in question, and accordingly hold that the decree of the lower court enjoining its enforcement is right."

§ 791. Single system service preferable if adequate.—While indicating its acceptance of the general principle of avoiding duplication and wasteful competition by the installation of motor vehicle lines unnecessarily, the Washington utilities commission expressed itself in full accord with the use of such transportation systems when they can be employed to advantage. The commission also indicated the necessity of considering the physical contour and general plan of cities with reference to their transportation problems in determining when motor buses can be used more advantageously than electric lines and how they can best be coordinated or operated as feeders of such lines. In the course of its well-reasoned holding in the case of *In re Washington Rapid Transit*, P. U. R. 1923B, 328, this commission said: "And similarly, the commission must protect these regulated companies actually furnishing reasonable and adequate service from unfair and unnecessary competition as well as from anything else, possibly proposed by the public, that would tend to deprive them of their common-law right to a fair return on the property judiciously dedicated to the service of the public. When the companies are furnishing adequate and convenient service, it is the duty of the commission to protect them against unfair and unnecessary competition; and, when their service is below a proper standard, it is the corresponding duty of the commission to protect the public by compelling the supply of adequate facilities. * * * At the time when this commission originally gave its approval to the establishment of bus service on a number of routes now being served by the Washington Rapid Transit Company, it was because on these routes, or rather between their termini, the street car lines at that time were seemingly unable during the rush hours to provide adequate and convenient carrying capacity for the public. The population and the number of

car riders were, however, greater than at present, and the conditions that warranted these comparatively large invasions of regions already served by the street railways certainly no longer present themselves. In any event, the commission at that time went to the limit of justifiable inroads upon the revenues of the latter companies, and experience has shown that further bus extensions of like character, while promoting the convenience of a relative few, would tend to damage the interest of greater numbers of the people. The street railway lines have been forced by law within the older part of the district to install the underground type of construction at about three times the cost for which trolley roads of equal carrying capacity might have been built; or, to put it otherwise, the lines might have been made three times as long without greater investment. These companies are required to pay a tax of four per cent upon their gross receipts, they must pave a large portion of the width of the streets they occupy, and they also pay the salaries of the street crossing policemen. All these charges must be earned over and above the so-called fair return, and all must be paid by the body of car riders. It so happens that certain streets, mostly diagonal, not occupied by car lines, lend themselves by their width or by their direction to more rapid and more direct transportation than it is possible for the street railway lines to afford between the same termini. It is upon such routes that bus lines have been established or sought to be extended, and invariably they take from the car companies the cream of their traffic—the short haul rider—this notwithstanding the fact that bus lines pay into the public treasury no gross receipts nor paving taxes and nothing for street crossing policemen, while on the other hand, they accentuate the congestion on our streets, add to the wear on our roads, and increase the need for traffic police. In our opinion, there is a legitimate field for bus service, but this does not lie in the multiplication of lines or of vehicles reaching the heart of the city. It lies rather in providing service in extension of the street car lines into territory so thinly settled as not to justify the large investment necessary for street railway service. The bus lines should be feeders. They should create business and not rob the street railways of the just reward due their heavy investments for the public benefit. An exception to this principle arises when the existing street railway service proves to be inadequate and, for reasons either physical or financial, additional street railway lines can not be created. In such cases, even in thickly settled territory, the obvious recourse is to bus lines; but, in the absence of legal

objections, the best interests of the public will be promoted by causing such lines to be owned and operated by the street railway companies and to coordinate them with the car lines so that transfer privileges and other desirable joint relations may result."

§ 792. **Coordinated systems or monopoly insures best service.**—Rhode Island furnishes an interesting discussion of the advantages and of the capacity of motor vehicles operating in connection or competition with street car systems. In speaking from the experience of several years during which the two systems were permitted to operate in competition with each other, the commission of this jurisdiction, in discussing from this highly practical point of view the relative merits of each system, indicated its final judgment as to the better plan of coordinating systems where both seemed necessary to meet the public demands, or of preferring one system over the other, preferably the established system which was rendering adequate service where the introduction of a new or additional system would only be for the purpose of rendering the same or a similar service. That the convenience and necessity provided for in the statute regulating the operating of motor vehicles as common carriers is not concerned with private or personal considerations but must be public in its nature, is the well-established principle which was perhaps best expressed in the holding of the Rhode Island public utilities commission in the matter of Applications for Certificates to Operate Jitneys, P. U. R. 1922E, 612, as follows: "The street railway service upon all of the lines which traverse the whole or any part of the jitney routes is adequate and sufficient to meet the reasonable demands of passengers seeking transportation over such lines. The monthly rush hour counts of all such lines, made at the peak load points, show that a very excellent service has been rendered during the rush hours. Figures were presented showing the number of seats furnished and the number of seats used in the several zones on the several routes, which indicated that the general service is adequate and much superior to the general standards of similar service rendered in other cities of similar and larger size. The track facilities are ample and the company is prepared with sufficient cars to meet any additional demands that may be thrown upon it, should the present direct jitney competition be removed. * * * The terms of the statute charge the commission with the duty of determining whether 'public convenience and necessity' require the operation

of jitneys over all or any of the routes for which certificates to that effect are sought by the applicants. The convenience and necessity must be 'public' in its nature, hence, all considerations that are merely private or selfish should be eliminated. What will conduce to the general public welfare of our urban communities seeking a dependable method of transportation is the objective to be sought. * * * The commission is clearly of the opinion that the street railway company should have the benefit of this additional revenue in order that the traveling public may have the benefit of improved service or a lower rate of fare, or both, which the receipt of such additional revenue would appear to make possible in the near future. The jitneys have been in operation for nearly seven years in various towns and cities within this state. In that period there seems to have been but little, if any, real development as a transportation agency. For the most part individual operation and ownership prevail, and it is apparent that one new set of men after another proceeds to engage in the business. For the most part the applicants who testified at the hearings had operated jitneys for less than two years. We have also considered the problem presented by reason of the comparatively narrow streets within the cities through which many of the jitneys operate, and the constantly increasing amount of traffic that is being thrown upon such main thoroughfares, by reason of the increasing number of privately owned automobiles, and the increasing use of the motor truck. We believe that public convenience and necessity require the transportation of passengers through these streets by as few separate vehicles as is reasonably possible. The operation of the jitney, especially during the rush hours has a tendency to create congestion, and, while transporting comparatively few passengers, contributes greatly to the delay of all other forms of traffic. * * * The limitations to jitney service are positive and definite. Such services can accommodate but a small part of the total traffic under favorable weather conditions, and there are a considerable number of days in each year when the jitney service is practically suspended and certainly would be entirely so if it were not for the fact that the streets are made passable for them by the snow plows of the street railway. Inclement weather has a marked tendency to cause the temporary withdrawal of jitneys from the streets and reduce their patronage. The maintenance of a continuous regular schedule would undoubtedly make the business unprofitable, even at very much higher rates than are charged by the street railways. The jitney flourishes because

of its ability to take advantage of the short haul rush hour business without having the responsibility of performing continuous and regular service imposed. It is in no sense dependable, and may be entirely interrupted over considerable periods of time because of weather or other conditions, or even the caprice or indisposition of the operator. It is unnecessary to call attention to the absolute necessity of a regular, frequent and dependable method of street transportation capable of furnishing facilities for all at fair and equitable rates. If it were necessary to choose between the two systems but one answer would be possible. The question involved, while of great importance from the economic standpoint, is one of public policy primarily. * * * The past or proposed rates for jitneys, some of which may or may not have been remunerative under a varying and unregulated schedule, and the present rates for the trolley, in some cases undesirably high because in part of past unregulated competition, are not controlling facts in determining public convenience and necessity. The tendency of jitney fares undoubtedly will be upwards when a scientific account is kept of operating revenues and expenses, while the tendency of trolley fares should be downward, particularly for short haul travel. The general public good and the general public requirements, rather than individual convenience or the desire to engage in business should have controlling influence. That street railways for urban and most of the suburban territory now served are absolutely essential and supply a necessary public service is not disputed; neither is it claimed at the present time that jitneys could take the place of the trolleys and supply the entire service required. As a general principle both forms of service can not exist in competition with each other. * * * Upon consideration of all the evidence we are of the opinion that the operation of a competing jitney and street railway service over the same route will not subserve the present or ultimate welfare of those requiring urban or suburban transportation, where the service rendered by the street railway is reasonably adequate to the reasonable demands of the public making use of such service."

Statutes and municipal ordinances for the purpose of preferring a single coordinated system of transportation may prevent competition with an existing system by prohibiting additional service from using the same or nearby parallel streets or highways, where the present service is meeting the public demands, and especially where the introduction of competitive service would tend to destroy or seriously handicap the efficiency of the

present transportation system. In holding that competition which cripples present service and tends to destroy the efficiency and economy of a continuous, unified service in the interest of the public may be prevented, the courts sustain the validity of legislation which fostered the present satisfactory service, for as the court said in the case of *Peoples Transit Co. v. Henshaw*, 20 Fed. (2d) 87: "We think the effect of this legislation was to give cities the right to reasonably regulate buses whether operated by street railways or others and to make such differences between them as were reasonable. * * * Also, the Statute of 1925 would seem to contemplate a difference in treatment as to routes because it authorized the use of buses by the street railway company as a coordinated part of its general system and the permission in the 1924 act allowing cities to exclude buses from street car streets or those paralleling car lines is for the sole purpose of protecting the street car systems from direct bus competition. There is no vested right in the use of streets. The legislature may deny, grant, or condition such use, or delegate such powers to the municipalities. This is the law under the constitution of Oklahoma. * * * We have no doubt of the validity of the 1925 act, even as above construed. Is the governing ordinance invalid for the reasons urged? * * * But all differences are not unreasonable and, therefore, illegal discriminations. In legislating for the public welfare, legislative bodies may, usually do, and should base their action upon actual conditions as they exist. It is to such conditions that the legislation will apply and it is such that will be affected thereby. Therefore, the matter of discrimination must be determined by an understanding of those conditions and of the effect designed or to be expected thereon from the legislation. If the difference is based upon a conception of the public welfare which finds reasonable basis in the existing conditions, it is not an illegal discrimination—otherwise, it is. The controlling factor is the welfare of the public affected. * * *

"If the bus business is unprofitable, the entire plant can be removed at once to more profitable fields. If the street car business is unprofitable, it must stay because of the large investment in permanent plant and of the crushing loss in any attempt to remove it or to suspend operation thereof. In any case, the people of the city must have local transportation whether it be by street cars, buses, a combination thereof or otherwise. There is a decided element of disadvantage to the people in having only a system of transportation which can disappear

almost overnight at the will of the owners. There is a decided advantage to the people in having a system that can not do so, but must, for its own protection, remain and furnish transportation. Obviously, the latter is more certain, more dependable and more subject to regulation in the public interest. The public can not expect to retain the latter, nor can it compel operation of such, if the revenues thereof fall to a loss below operation costs. Also, where an adequate transportation system is serving the people, there is no reason of public welfare which demands that the same and closely adjacent streets shall have an additional system. The public welfare does not demand such competition to secure reasonable rates or proper service because all such matters are subject to public regulation and control. * * *

"These considerations, and others, amply justify differences to protect and preserve the existing permanent system. No new system has a legal right to destroy such existing system and have the public at its mercy. The public welfare is not served, but harmed thereby. The public may protect itself against such results. Nor can any theory of free competition change this situation. Competition is recognized and encouraged for the sole reason that it is supposed to result in the public good. But competition is not necessarily unrestrainable. It can not be allowed to harm the very public it was designed to protect and aid. It may be restrained for the public welfare just the same as monopoly may be restrained or as competition may be left unrestrained. The test in each instance is the public good. Where the restraint upon competition is for the public good, it is sustainable just as restraint upon freedom of action by the individual is valid where for the public good. Such is the basis of and the reason for the entire police power. * * * The restraint of this ordinance (section 11) and that permitted by the statute of 1924 (section 4532), is that no bus line may parallel an existing street car line nearer than the third street. In practical effect, this means that the street car line is protected on its own street and for a block and half on either side. Certainly, this is not the exercise of the power to protect the existing system to an unreasonable extent or for an unreasonable distance. The question then arises whether the street railway, if it operates buses, shall be subject to the same restriction. Such a contention involves the patent inconsistency of using a provision intended for the protection of the railway to cripple it by preventing its using its buses wherever they will best serve the public as a part of its entire system of transportation. Not only is this violating the spirit and de-

feating the purpose of the restriction, but it may be harmful to the public. We conclude that the statute and the ordinance are valid."

§ 793. **Regulation of interstate commerce.**—Although sometimes engaged in interstate commerce motor vehicles as common carriers are still mainly local in the scope of their operations and are subject to regulation by state and local authorities. In the absence of federal regulation of this service, which has not yet been established by congress, the state has the exclusive jurisdiction, directly or through its duly authorized agencies, over the regulation of such motor vehicle service, as is indicated by the Pennsylvania public service commission in the case of *Chambersburg, Greencastle &c. St. R. Co. v. Hardman*, P. U. R. 1921C, 628, as follows: "Jitney or auto bus transportation, largely in the hands of individuals and extending over comparatively short routes, and usually serving localities of limited areas, is of such a peculiarly local nature as to bring it within that class of interstate service which the courts have pointed out are more properly left to the regulatory control of the state than to be subjected to the control of the federal government."

That intrastate business is subject to the regulation of the state although conducted by an interstate carrier is indicated in the case of *Haselton v. Interstate Stage Lines*, 82 N. H. 327, 133 Atl. 451, P. U. R. 1926E, 424, where the court said: "It is clear that no one of the cited cases, federal or state, gives countenance to the defendant's position that its character as an interstate carrier entitles it to immunity from state control in its proposed intrastate operations."

This same court in an earlier case indicated that a tax or license fee of the state, which was levied on motor vehicles operating on the highways in payment for the privilege of so operating, may not be regarded as a "toll," which is prohibited by federal legislation with reference to federal aid roads, for as the court said in the case of *Martine v. Kozer*, 11 Fed. (2d) 645: "If such a tax or license fee is not inimical to the interstate commerce clause of the constitution, it is not at all clear or obvious that it contravenes the clause respecting tolls of any kind as found in the Rural Post Roads and Federal Highway Acts. Indeed, it would seem that, on the contrary, it does not. The state act, being a police regulation, must be deemed to be regular and valid, unless it appears on its face to be an unreasonable and arbitrary exercise of the police power, or is made so to appear by

clear and cogent showing aliunde. Such a showing has not been attempted. I am in accord with the Supreme Court of the state that the state regulation, upon its face, is not an arbitrary nor despotic exercise of the police power. Further than this, as we said in the Anthony case, 11 Fed. (2d) 641, the tax lacks the characteristics of a toll. * * * So we say here the registration or license fees here exacted have no relation to the tolls inhibited by the acts of congress, and are not to be condemned as such. I am persuaded, therefore, that the registration or license fees, or privilege tax, as designated by the state Supreme Court, here imposed are not a toll of any kind within the intendment of the acts of congress cited, and therefore that the state legislation is not void, as contended by complainants."

Motor vehicles operating as common carriers over the public highways of the state are subject to the regulation of the state and may be required to pay a reasonable license fee for the privilege of doing so, whether the commerce or service is intrastate or interstate; and the fact that the carrier has a private contract with the shippers does not prevent him from being treated as a common carrier, especially where he holds himself out for service to the public generally. Such a tax will not be treated as a "toll" within the meaning of the federal statute, because it is merely a tax for the privilege of using the highways. This principle is established and discussed as follows in the case of *Sanger v. Lukens*, 24 Fed. (2d) 226: "Turning to the Idaho law, we find that the act provides that any person, copartnership, corporation, or association, who owns, operates, or manages any motor-propelled vehicle for the transportation of persons or property for compensation over any public highway in the state, shall be an auto transportation company, and are [is] required to comply with the provisions thereof. Highways are established for the use and convenience of the public, and the state has the power, through its legislature, to regulate the use thereof, and may impose any regulation upon their use that might conceivably promote the public interest. It may exclude traffic of certain kinds, or make the use by such traffic conditioned upon the payment of certain fees. *Packard v. Banton*, 264 U. S. 140, 44 Sup. Ct. 257, 68 L. ed. 596. And it seems now definitely settled that the state may, in the absence of national legislation upon the subject, rightfully prescribe uniform regulations necessary for public safety, and impose a graduated license fee upon motor vehicles moving in intrastate or interstate commerce upon its highways.

* * * This law merely imposes regulations upon all who use

the highways for commercial purposes and gain, and is applicable alike to all who come within the statutory definition of an auto transportation company. The statute does not in terms or by implication affect the status of the plaintiff, even if he is a private carrier. * * * His trucks are not operated in the transportation of his own property; such as the merchants or lumbermen, who sell and deliver their goods and lumber to purchasers, but in the transportation, for anyone who pays therefor, of the property of anyone to any place. He thereby, under such conditions, elects to act as a common carrier, and becomes subject to the state's control, and whenever it appears that he is passing as a private carrier, when in reality he is a common carrier, it should so be declared, and his operations regulated accordingly. * * * It will thus be seen that the plaintiff holds himself out to the public and transports upon the highways for compensation all property for anyone, and by so doing he becomes a common carrier, and can not escape liability as such by insisting upon a private contract with the shippers, and securing at the same time all the privileges afforded common carriers, without assuming any of their obligations or duties. A common carrier is 'one who, by virtue of his calling and as a regular business, undertakes to transport persons or commodities from place to place, offering his services to such as may choose to employ him and pay his charges.' * * * In referring to the state law, the Supreme Court of the state held that 'the five per cent tax levied by the act is not a "toll." Its levy is not in violation of "the Acts of November 9, 1921 (1921 Supp. Fed. Stats. Ann. 95 [23 USCA, section 1 et seq.]), and of July 11, 1916 (1918 Supp. Fed. Stats. Ann. 639 [Comp. St., sections 7477a-7477i, 5150a]), forbidding tolls on federal aid roads."' * * * Thus we see that the license fee or privilege tax imposed by the statute is not a 'toll' of any kind within the meaning of the act of congress, and therefore the state legislation is not void."

This case was reversed and remanded for further proceedings not inconsistent with the decision in *Sanger v. Lukens*, 26 Fed. (2d) 855, where the court said: "In the light of this distinction we can not say that under any reasonable construction of the pleadings it necessarily appears that plaintiff is a common carrier. Determination of that issue must await a showing of the particular facts. Inasmuch as upon the facts, plaintiff may ultimately be found not to be a common carrier, and hence out of the range of the statute, we need not presently consider whether in any feature assailed it is invalid."

The state may levy a tax or require the payment of a registration fee on motor vehicles operating within the limits of municipalities and graduated according to weight or horse power, regardless of the action of the municipalities in the matter where they operate. That such a requirement does not constitute a violation of the federal act prohibiting tolls is the effect of the decision in the case of *Carley & Hamilton, Inc. v. Snook*, 38 Fed. (2d) 1003: "The plaintiffs challenge the validity of those portions of the act imposing a tax or registration fee on the vehicles owned and operated by them within the corporate limits of the several municipalities of the state, on the ground that the fee is in the nature of a toll for the use of the highways, and inasmuch as the plaintiffs make no use of the highways outside of the municipalities and are taxed for such use by the municipalities, the exaction by the state violates the Fourteenth Amendment to the Constitution of the United States. This broad contention can not be sustained. In the lawful exercise of its acknowledged police power, the states may, beyond question, exact registration fees from owners and users of motor vehicles, varying with their horse power or weight, regardless of the extent or place of use, so long as the vehicles are or may be used on the public highways of the state. * * * For these reasons we are of the opinion that the registration fee imposed by the state is a valid exercise of the police power of the state and violates no provision of the Constitution of the United States. Whether the fee or tax imposed by the municipalities for the like use is valid or not, we need not inquire because its validity is not questioned."

While the state may deny a certificate of convenience and necessity to motor vehicles operating as common carriers on its highways when engaged in intrastate business, it can not do so when such business is entirely interstate, because this would be in violation of the federal Constitution and an undue interference with interstate commerce. Carriers by motor vehicles engaging in both interstate and intrastate commerce, however, can not escape the duty of securing certificates for their intrastate business, because they are also doing an interstate business. This principle and the rules regulating its application are clearly set forth as follows in the case of *Atlantic-Pacific Stages, Inc. v. Stahl*, 36 Fed. (2d) 260, P. U. R. 1930B, 411: "The plaintiff, a Delaware corporation, is a common carrier by motor buses. Desiring to operate its buses through Missouri along what is known as federal highway No. 40, it applied on November 24, 1928, to the public service commission for a certificate of convenience and

necessity authorizing it to carry passengers solely in interstate commerce upon said highway. On April 4, 1929, the certificate applied for was denied on the ground that the plaintiff had been and at the time of the denial still was unlawfully engaged in the intrastate carrying of passengers. On the same ground a second application for a certificate of convenience and necessity, applied for May 31, 1929, was denied by the commission October 1, 1929. At the time of each application the plaintiff offered to comply with all requirements of the laws of Missouri relating to interstate carriers of passengers by motor buses over the highways of the state. * * * Prior to April 5, 1927, the public service commission had no control over common carriers by motor buses. Such control was on that date conferred on the commission. Laws of Missouri 1927, p. 402. By the terms of the law then enacted, it was made unlawful for any common carrier by motor buses to furnish service within this state without first having obtained a certificate of convenience and necessity from the commission. The commission was given the power (section 4) to refuse such a certificate if in its judgment public convenience and necessity would not be promoted by such service. Nowhere in the act is any distinction made between the interstate transportation of passengers and transportation intrastate. The public service commission construed this law as requiring a carrier to apply for a certificate of convenience and necessity even for interstate transportation of passengers. The language of the act warrants that construction. It is our view, however, that, so construed, the act goes beyond the state's power and invades the exclusive jurisdiction of congress to regulate interstate commerce. The exclusive control of interstate commerce is given by the constitution to congress. No state may pass any law which prohibits or unduly burdens interstate commerce. For certain limited purposes a state may pass a law which incidentally affects interstate commerce, provided it does not prohibit or unduly burden such commerce. Thus a state may pass a law imposing a tax upon a company operating motor vehicles exclusively in interstate commerce over the highways of the state if it is imposed for the upkeep and maintenance of those highways, provided it does not discriminate against interstate commerce. A state may, for the safety of its people, enact police regulations governing the manner in which its highways are used. Such laws are binding upon persons engaged exclusively in interstate business as well as upon others, provided they are reasonable regulations and not discriminatory. A state may require an interstate carrier to obtain a

permit before using the highways of the state and may condition the issuance of that permit upon compliance by the carrier with such laws as those described—such laws, that is, as it is proper for the state to enact, not including, however, any law either prohibiting or imposing an undue burden on interstate commerce. These are the general principles which are applicable to the question here and in the light of which it must be determined. Where a carrier is engaged exclusively in interstate commerce a state may not require it to obtain a certificate of convenience and necessity. *Clark et al. v. Poor et al.*, 274 U. S. 554, 47 Sup. Ct. 702, 71 L. ed. 1199. Where a carrier is engaged in both interstate and intrastate transportation of passengers, the state may require it to obtain a certificate of convenience and necessity and to pay a license tax as to its intrastate business, but only if that will not result in burdening unduly its interstate business. *Interstate Busses v. Holyoke Ry.*, 273 U. S. 45, 47 Sup. Ct. 298, 299, 71 L. ed. 530. * * * The law then is that a state may not require a carrier doing both intrastate and interstate business to obtain a certificate of convenience and necessity or a license as to its intrastate business, if that will burden its interstate business. Certainly, if it can not even burden a carrier's interstate business by requiring it to obtain a certificate of convenience and necessity or a license as to its intrastate business, it can not absolutely prevent its doing an interstate business because it has not obtained as to its intrastate business such a certificate or license. Where there is an intermingling of intrastate and interstate carriage of passengers by a transportation company, the interstate business may not on that account even be taxed by the state. * * * If, notwithstanding the intermingling of interstate and intrastate business, the interstate business of such a company may not even be taxed, a fortiori it may not be prohibited. Suppose a law enacted by the legislature prohibiting all persons from using the highways of Missouri for the interstate transportation of passengers if they also carry passengers intrastate without certificates of convenience and necessity. Such a law could be defended only on the doctrine that a state may invade the exclusive field of legislation given by the constitution to congress if it is done for the purpose of more effectively enforcing the state's laws. No such doctrine is tenable. Yet the law we have supposed is really what we have here as it has been construed and applied by the commission. The commission's order was not one which merely incidentally affected interstate commerce. It was not made in the exercise of the police power for

the protection of public safety. It was as to this plaintiff an absolute and unconditional prohibition of interstate commerce imposed, not because of any failure by the plaintiff to comply with some condition prescribed in the statute as to such commerce, but as a punishment for past and possible future transgressions entirely unrelated to interstate commerce. The state may deny a certificate of convenience and necessity to any applicant for authority to do an intrastate business as a common carrier on the highways of the state. It had the right to deny such a certificate to this plaintiff. If the plaintiff carries on an intrastate business on the highways of the state in defiance of the authority of the state, it may be punished for it. It may be punished by a fine or other pecuniary penalty or by imprisonment of its officers and agents. But it may not be punished by deprivation of its constitutional right to engage in interstate commerce.

* * * If the amendment of 1929 is construed as giving the public service commission authority to deny an interstate permit on the ground that the carrier seeking it has not complied with the law as to intrastate carriers then it contravenes the commerce clause of the constitution. We have stated the reasons for this conclusion in connection with our discussion of the act of 1927. We conclude then that under the act of 1927 the plaintiff required no certificate of convenience and necessity to do an interstate business, and that under the amendment of 1929 it is entitled to a permit to do an interstate business if it applies therefor and meets with the conditions set out in the amendment. Whether it is entitled to an interlocutory injunction is another question. The plaintiff has never applied for a permit under the amendment of 1929. The defendant commissioners have never denied any application for a permit under that amendment. We can not presume that the commission will deny a permit if the plaintiff applies for it and complies with the law as to such an application. What remains is this: The plaintiff's employees have been and will be arrested by the defendant sheriff. He has no lawful authority to arrest them for not having a certificate of convenience and necessity to do an interstate business. But there appear good reasons to believe that the plaintiff is doing both an interstate and intrastate business and the latter without ever having obtained a certificate of convenience and necessity. If that is true, the defendant sheriff does have the right to arrest the employees of the plaintiff unless the plaintiff has a certificate of convenience and necessity to do an intrastate business. And while the public service commission may not cause

the defendant sheriff to arrest plaintiff's employees for operating without a certificate of convenience and necessity to carry passengers interstate, certainly the commissioners or any others may lawfully cause the defendant sheriff to make arrests of plaintiff's employees for operating an intrastate business without a certificate of convenience and necessity. We should not then and can not enjoin the defendant sheriff from arresting or the defendant commissioners from causing the arrest of the employees of the plaintiff. At the most we are warranted in enjoining the enforcement as against the plaintiff of so much of the Motor Bus Law of 1927 as makes it a misdemeanor for one engaged exclusively in the interstate transportation of passengers to operate without a certificate of convenience and necessity. To that much we think the plaintiff is entitled."

A state may not require a certificate of convenience and necessity as a condition of a motor vehicle operating for hire entirely in interstate commerce, although it may make reasonable traffic regulations and charges for the use of its highways in doing so, for as the court said in the case of *Blease v. Safety Transit Co.*, 50 Fed. (2d) 852: "The Safety Transit Company, a North Carolina corporation, is engaged in operating a bus line between Washington, D. C., and Miami, Florida, through the state of South Carolina. * * * The commission denied the application for the certificate; and the transit company, thereupon, abandoned all effort to operate in intrastate commerce but continued to operate in interstate commerce. * * * No question is raised as to any failure on the part of defendant to comply with the tax laws or police regulations of the state. On the contrary, it appears that it has complied or offered to comply with all of these. * * * It is in effect a suit to enforce the order of the railroad commission with respect to the use of the roads by competing bus lines. The persons interested are complainant and competing bus lines and the public which patronizes them. * * * But, even if the state be considered the real party in interest, the right of removal would nevertheless exist, because the case is one arising under the Constitution of the United States, the point presented being the right of a state to require a bus line engaged in interstate commerce to obtain, as a condition of carrying on such commerce, a certificate of public convenience and necessity. * * * As heretofore stated, no question is raised as to any failure of defendant to comply with the tax laws or police regulations of the state. It has complied with all of these. Nor is there any question as to the power of the state to regulate the intrastate

business of defendant. It has been granted a certificate to operate buses in intrastate commerce on one of its lines and is not seeking to operate in intrastate commerce on the other. The sole question is whether the state can require defendant to obtain a certificate of public convenience and necessity as a condition of operating its buses in interstate commerce through the state; and this question has been so repeatedly answered in the negative as not to justify further discussion of the principles involved."

Motor vehicles operating for hire over the highways of a state, although engaged in interstate commerce exclusively, may be required to secure a permit from the state and pay an annual license fee and a reasonable tax for the privilege of doing so, and to submit to reasonable regulations to insure the public safety and convenience, for as the court said in the case of *Clark v. Poor*, 274 U. S. 554, 71 L. ed. 1199, 47 Sup. Ct. 702, P. U. R. 1927D, 346: "The Ohio Motor Transportation Act of 1923 as amended, General Code, sections 614-84 to 614-102, provides that a motor transportation company desiring to operate within the state shall apply to the public utilities commission for a certificate so to do and shall not begin to operate without first obtaining it; also, that such a company must pay, at the time of the issuance of the certificate and annually thereafter, a tax graduated according to the number and capacity of the vehicles used. Sections 614-87, 614-94. Clark and Riggs operate as common carriers a motortruck line between Aurora, Indiana, and Cincinnati, Ohio, exclusively in interstate commerce. They ignored the provisions of the act, and operated without applying for a certificate or paying the tax. * * * The plaintiffs claim that, as applied to them, the act violates the commerce clause of the federal Constitution. They insist that, as they are engaged exclusively in interstate commerce, they are not subject to regulation by the state; that it is without power to require that before using its highways they apply for and obtain a certificate; and that it is also without power to impose, in addition to the annual license fee demanded of all persons using automobiles on the highways, a tax upon them, under section 614-94, for the maintenance and repair of the highways and for the administration and enforcement of the laws governing the use of the same. The highways are public property. Users of them, although engaged exclusively in interstate commerce, are subject to regulation by the state to insure safety and convenience and the conservation of the highways. *Morris v. Doby*, No. 372, decided April 18, 1927

(274 U. S. 135, ante, 966, 47 Sup. Ct. 548). Users of them, although engaged exclusively in interstate commerce, may be required to contribute to their cost and upkeep. Common carriers for hire, who make the highways their place of business, may properly be charged an extra tax for such use. * * * This, if true, is immaterial. Since the tax is assessed for a proper purpose and is not objectionable in amount, the use to which the proceeds are put is not a matter which concerns the plaintiffs. * * * The plaintiffs did not apply for a certificate or offer to pay the taxes. They refused or failed to do so, not because insurance was demanded, but because of their belief that, being engaged exclusively in interstate commerce, they could not be required to apply for a certificate or to pay the tax. Their claim was unfounded."

§ 794. **State regulation in absence of federal.**—That the proper regulation of this transportation system by the state does not impose an unreasonable burden on interstate commerce is the effect of the decision in the case of *Interstate Motor Transit Co. v. Kuykendall*, 284 Fed. 882, P. U. R. 1923D, 444, where the court said: "Our inquiry, therefore, is limited to the question whether it interferes with or imposes an unreasonable burden on interstate commerce. The state of Washington has expended and is expending many millions of dollars for the construction and reconstruction of highways within its boundaries. The act in question, and the acts of the state of which it is supplementary, provide for a comprehensive system of highways, and for the regulation of motor and other vehicles operating thereon. Among the powers granted to the national government is the regulation of interstate commerce. Article 1, section 8, Constitution. While congress has exercised this power in a variety of acts, it has not done anything which in any way takes from the state the control of the highway within its boundaries, and the right to charge a reasonable compensation for the privilege of driving motor vehicles thereon."

Under its general powers of regulation, public utilities commissions may refuse or revoke certificates for service, and their action will be sustained by the courts unless unreasonable or unlawful, as is indicated in *Cannonball Transp. Co. v. Public Utilities Comm.*, 124 Ohio St. 474, 179 N. E. 355, where the court said: "While not authorized to exclude motor transportation companies operating in interstate traffic over the highways, it has full authority to regulate their operation in so far as the regulation does not amount to a restraint or impose unreasonable

burdens upon interstate commerce. The authority of the commission has thus been well defined, and under the facts disclosed by the record the action and order of the commission in this case are neither unlawful nor unreasonable. * * * The commission under the provisions of section 614-87, General Code, may at any time for good cause, upon giving the required notice and affording an opportunity to be heard, revoke any certificate issued by it under and by virtue of the motorbus statutes. * * * The refusal of the public utilities commission to revoke the certificate theretofore granted the American Stages, Inc., was within the proper exercise of its authority, and hence was neither unreasonable nor unlawful. It follows that in each case the order of the public utilities commission is affirmed."

In the absence of federal legislation and in the exercise of its police power the state may make reasonable regulations for motor vehicles operating as common carriers over its highways, although engaged in interstate business, but such regulations must be uniform and not discriminatory, for as the court said in the case of *Farnum v. Public Utilities Comm.* (R. I.), 158 Atl. 713: "In the absence of national legislation covering the subject, a state, in the exercise of its police power, may regulate interstate vehicular travel upon its highways. Such regulation must, so far as is practical, be uniform and nondiscriminatory. * * * The commission has investigated the local traffic conditions and we are satisfied that they have acted in good faith. Has there been an abuse of its discretion? We think not. Petitioner does not claim that his business will suffer if he leaves his incoming passengers at Mann avenue. His loss of profit, if any, will result from his inability to pick up outgoing passengers within the forbidden area. But this consideration is not controlling if the order of the commission is reasonable as it is in the case at bar."

In order to avoid congested traffic and to remove hazardous traffic conditions in the interest of the public safety the state through its public utilities commission may regulate motor vehicles operating as common carriers in interstate commerce and fix their routes over highways that are less congested than those formerly used by such vehicles, for as the court said in the case of *Motor Transport & Truck Co. v. Public Utilities Comm.* (Ohio), 181 N. E. 665: "The public utilities commission does not preclude operation by the plaintiff in error over our highways, but directs operation over a route which will result in diverting the proposed increased traffic from a highway now found to be overburdened. The record does not disclose that the order of the

commission will result in the prohibition of the business of one engaged in interstate commerce, nor even that it will cause substantial interference therewith. The action of the commission is not shown to have been arbitrary or unreasonable, nor does it appear from the record that the carrier may not as well operate between the desired termini over another highway which is not so congested as to have become unduly hazardous. * * * The restriction involved in the instant case comes within the rule stated in the foregoing cases and conforms to the decision of this court in Cannonball Transportation Co. v. Public Utilities Commission, 113 Ohio St. 565, 149 N. E. 713. It is not an infringement upon, or impairment of any right secured by either the state or the federal Constitution."

Where the public convenience and safety require a change in the routing of motor vehicles operating in interstate commerce the action of the state in effecting such change will be sustained by the courts if reasonable and another route is provided which is similar to the one formerly used, for as the court said in the case of Phillips v. Moulton, 54 Fed. (2d) 119: "We are here dealing with a regulation of interstate commerce in respect to which congress has not acted. The assumption of authority by the state is prompted by local traffic conditions and in the interests of public convenience. While neither the state nor municipal authorities could, in furtherance of such a purpose, bar the exit and entrance from the city of complainant's vehicles nor could they impose conditions as to routes and termini so exacting as to destroy the complainant's business, they may in furtherance of such an end impose regulations which are reasonable. * * * The reasonableness of the regulation proposed under the order here in question can only be appraised by the reasonableness of the substituted routes and termini to which the commission will give its approval. Assuming that the complainants will themselves cooperate by submitting reasonable proposals for substitute routes, the commission may not bar them from the use of their present routes and termini without giving its approval to others that are reasonable and adequate."

While a public utilities commission may not deny a certificate for interstate commerce, or unduly burden the issue of a certificate for such purpose, it may condition its issue on the payment of a reasonable tax and obedience to safety regulations, although it may deny such a certificate unless similar certificates were secured from adjoining states, unless this proves to be an unreasonable and unnecessary requirement. A certificate for

intrastate commerce, being a revocable license, which is not transferable as a property right, the court indicates that the same rule applies to certificates for interstate commerce in the case of *Cannonball Transp. Co. v. American Stages, Inc.*, 53 Fed. (2d) 1051: "State laws, regulatory in nature, which by the terms thereof deny to common carriers for hire engaged in interstate business the use of the highways, in effect amount to a prohibition of competition, violate the commerce clause of the Constitution of the United States, and such legislative enactments, which in their practical application permit infringing upon or burdening interstate commerce, are unconstitutional. *Buck v. Kuykendall*, 267 U. S. 317, 45 Sup. Ct. 326, 69 L. ed. 623; *Red Ball Transit Company v. Marshall et al.* (D. C.), 8 Fed. (2d) 635. Likewise, the order of an administrative board or officer, the obedience of which will infringe upon or burden interstate commerce, is unconstitutional. *Magnuson v. Kelly* (D. C.), 35 Fed. (2d) 867. It is proper, however, for a state, through its legally constituted administrative board, to require a common carrier by motor to apply for and obtain a certificate or permit for the use of the highways of the state in interstate commerce, and to be required to submit to certain reasonable regulations and the payment of a reasonable tax for the maintenance and repair of the highways, including a portion of the defraying of expenses of the commission and the enforcement of the legislation. *Clark et al. v. Poor et al.*, 274 U. S. 554, 47 Sup. Ct. 702, 71 L. ed. 1199. The three decisions of the Supreme Court of the United States, and the two decisions of three-judge courts, within this sixth appellate district, just cited, are decisive, to the end that the Ohio board of public utilities first were not clothed with the authority to deny the application of this defendant company a certificate or permit to operate bus transportation in interstate commerce, and that, secondly, it did have the authority and power to require an application as a prerequisite to the right to operate, and thereby require and impose certain reasonable judicially recognized regulations and restrictions. And the final order of the commission granting the application only on condition that the defendant company obtain permits from the other states concerned at this time and for the purposes of this case may be assumed to have been a reasonable requirement, inasmuch as the evidence shows that compliance with the requirement has taken place. * * * The Ohio Supreme Court in recent decisions has held that a certificate of convenience and necessity, issued and covering intrastate commerce, which of course is within the en-

tire control of the state, is no more than a revocable license. * * * If an intrastate certificate, the issue or refusal to issue of which is within the entire control of the state, when granted, transfers to the recipient no franchise or property right, certainly it may not be said that the issue of an interstate certificate, wherein the state may not deny the permit, but only regulate its use, would or could have any standing as a property right."

While a reasonable tax may be imposed for the issuance of a certificate for interstate commerce, where the tax imposed is the same as that for intrastate commerce and the use of the highways in the two instances is out of all proportion to the tax required, the requirement as to interstate commerce will be set aside as unreasonable. Since the state has complete control over its intrastate commerce it has a much wider latitude of classification which may include the horse-power of the motor, its value, size, weight, capacity, or gross earnings as well as the nature and extent of the use made of the highways. This principle and the facts covered in its application are well discussed as follows in the case of *Prouty v. Coyne*, 55 Fed. (2d) 289: "The state may constitutionally impose a tax burden on interstate commerce as compensation for the use of the public highways, provided the charge is only a reasonable and fair contribution to the expense of construction and maintenance of such highways and of regulating the traffic thereon. * * * In the instant case, it appears from the face of the act that the avowed purpose of the tax was for compensation for the use of the highways. This being true, the burden of proof was upon the plaintiffs to show that the tax bears no reasonable relation to the privilege of using the highways, or is unreasonably discriminatory. To sustain the act as a burden on interstate commerce, three things must appear: First, that the tax was levied only for compensation for the use of the highways; second, that the tax as levied bears a reasonable relation to the privilege of using the highways; and, third, that it is not unreasonably discriminatory. * * * In the instant case, it appears that a number of the plaintiffs engaged in interstate commerce make only occasional and infrequent, though necessary, trips over the South Dakota highways, yet they are required under the statute to pay the same amount of tax, if such trips exceed four in number, as those who may be constantly using the highways. As to those engaged in interstate commerce, the act must be held to be unconstitutional. *Interstate Transit, Inc. v. Lindsey*, 283 U. S. 183, 51 Sup. Ct. 380, 75 L. ed. 953;

Sprout v. South Bend, 277 U. S. 163, 48 Sup. Ct. 502, 72 L. ed. 833, 62 A. L. R. 45. As to intrastate commerce, a wider latitude of classification rests with the legislature. The state may tax the privilege of doing an intrastate business, regardless of whether the charge imposed fairly represents compensation for the use of the highways. It has already been pointed out that a classification graded for purpose of license fee or excise tax, according to horse-power of the motors, according to the value of the vehicle, according to the size, weight, capacity or load or seating capacity, where the tax is not a burden on interstate commerce, will be sustained. * * * The purpose of the tax is to secure funds for the construction and maintenance of the highways. The legislature may properly subdivide and classify for purposes of taxation. We can not say that fixing a lower tax on vehicles used in constructing and maintaining highways, and those used in transporting material and products to a mine or sawmill, is arbitrary. One of the purposes of the law is to impose the greater part of the burden of maintaining the highways upon those who most use them, and a classification according to the nature of the uses to which they are put, or in proportion to the extent of their use of the highway, is reasonable. * * * The power to regulate and to tax being conceded, the details of the legislation and the exceptions which shall be made rest primarily with the legislature. It is a well-established rule that, whenever the classification is called in question, if a state of facts reasonably can be conceived that would sustain it, the existence of that state of facts must be assumed. * * * In the instant case, in the absence of evidence on the subject, we should presume, in support of the constitutionality of the statute, that these exempted vehicles do not use the highways to the same extent, and do not inflict damage on the highways to the same degree, as do the vehicles not within the exemptions. We should also be warranted in assuming, in the absence of evidence, that the traffic moved in vehicles so exempted is not substantial. This is true also with reference to the exemption covering hearses. The classification exempting them is clearly a reasonable one. We conclude that the statute does not violate the equal protection of the law clause of the Constitution of the United States. * * * The exaction here is graded according to gross earnings, which would seem to be a fair and reasonable method of determining the amount of the tax. Such a standard should reasonably reflect the use made of the highways, and we are of the view that this law is not violative of either the com-

merce clause or the equal protection of the law clause of the Constitution. Being engaged solely in interstate commerce, these plaintiffs can not be affected by the exemptions contained in the act."

The state, directly or through its municipalities, has the power to control and regulate the use of its highways by motor vehicles, operating for hire thereon, so long as it does not directly burden or seriously interfere with interstate commerce; and the fact that the motor vehicle carries interstate as well as intrastate passengers does not relieve it of the necessity of obtaining a certificate from the state, permitting it to carry on intrastate business. This principle is established and discussed as follows by the Supreme Court of the United States in the case of *Interstate Busses Corp. v. Holyoke St. R. Co.*, 273 U. S. 45, 71 L. ed. 530, 47 Sup. Ct. 298, P. U. R. 1927B, 46, where the court said: "It transports persons from one state into the other, and also those whose journeys begin and end in Massachusetts. Both classes of passengers, intrastate and interstate, are carried in the same vehicles. Intrastate passengers constitute a very substantial part of the whole number carried in Massachusetts. * * *

The operation of the buses in competition with the street railway has resulted in substantial loss to the latter. Appellant has not obtained a license from any of the cities or towns served by the street railway company. And that company, its president and counsel, have caused plaintiff's employees to be arrested and prosecuted and intend to continue to prosecute them for operating without obtaining the licenses and certificate required by the statute. The statutory provisions in question have been sustained by the highest court of Massachusetts. * * *

The act existed in some form before interstate transportation of passengers for hire by motor vehicle was undertaken. Its purpose is to regulate local and intrastate affairs. *Barrows v. Farnum's Stage Lines*, 254 Mass. 240, 150 N. E. 206. No licenses from local authorities or certificate of public convenience and necessity is required in respect of transportation that is exclusively interstate. * * *

The burden is upon appellant to show that enforcement of the act operates to prejudice interstate carriage of passengers. The stipulated facts do not so indicate. The threatened enforcement is to prevent appellant from carrying intrastate passengers without license over that part of its route which is parallel to the street railway. Its right to use the highways between Springfield and Hartford is not in controversy. * * *

It is not shown that the two classes of business are so com-

mingled that the separation of one from the other is not reasonably practicable or that appellant's interstate passengers may not be carried efficiently and economically in buses used exclusively for that purpose or that appellant's interstate business is dependent in any degree upon the local business in question. Appellant may not evade the act by the mere linking of its intrastate transportation to its interstate or by the unnecessary transportation of both classes by means of the same instrumentalities and employees. * * * There is no support for the contention that the enforcement of the act deprives it of its property without due process of law. Undoubtedly, the state has power in the public interest reasonably to control and regulate the use of its highways so long as it does not directly burden or interfere with interstate commerce. * * * The terms of the act are not arbitrary or unreasonable. Appellant has not applied for and does not show that it is entitled to have a license from the local authorities or a certificate of public necessity and convenience from the department. Plainly, it has no standing to attack the validity of the statute as a violation of the due process clause."

§ 795. Reasonable state tax for use of highways proper charge on interstate commerce.—To a like effect the Supreme Court of the United States in the case of *Hendrick v. Maryland*, 235 U. S. 610, 59 L. ed. 385, 35 Sup. Ct. 140, in sustaining such state regulation of motor vehicles spoke as follows: "The movement of motor vehicles over the highways is attended by constant and serious dangers to the public, and is also abnormally destructive to the ways themselves. Their success depends on good roads, the construction and maintenance of which are exceedingly expensive; and in recent years insistent demands have been made upon the states for better facilities, especially by the ever-increasing number of those who own such vehicles. As is well known, in order to meet this demand and accommodate the growing traffic the state of Maryland has built and is maintaining a system of improved roadways. Primarily for the enforcement of good order and the protection of those within its own jurisdiction the state put into effect * * * general regulations, including requirements for registration and licenses. A further evident purpose was to secure some compensation for the use of facilities provided at great cost from the class for whose needs they are essential, and whose operations over them are peculiarly injurious. In the absence of national legislation covering the subject, a state may rightfully prescribe uniform regulations necessary for public safety and order in respect to

the operation upon its highways of all motor vehicles,—those moving in interstate commerce as well as others. * * * In view of the many decisions of this court there can be no serious doubt that where a state at its own expense furnishes special facilities for the use of those engaged in commerce, interstate as well as domestic, it may exact compensation therefor. The amount of the charges and the method of collection are primarily for determination by the state itself; and so long as they are reasonable and are fixed according to some uniform, fair, and practical standard, they constitute no burden on interstate commerce."

Motor vehicles operating for hire on the streets and highways of the state may be required to secure certificates of convenience and necessity, although their operations extend into foreign territory, and part of their business is foreign commerce. This principle is established and discussed as follows in the case of *Woolf v. Del Rio Motor Transp. Co.* (Tex. Civ. App.), 27 S. W. (2d) 874, P. U. R. 1930D, 308: "The operation of the motor bus in the territory mentioned was not exclusively foreign commerce. Besides, the state of Texas had the authority to require appellant to secure a certificate of convenience and necessity before operating motor buses over highways within this state. * * * As the defendants were operating motor vehicles and engaging in the business of transporting persons for compensation over the public highways within this state, and had no permit or certificate from the railroad commission of Texas, the injunction was properly issued restraining the operation thereof. The testimony showed the defendants operated outside of the city of Del Rio and in every direction that they had a chance. * * * Since the statute does not seek to define the word 'suburb,' we are left to work out and give to that word the usual, familiar, and generally understood meaning, as used in everyday life. We do not see how by any stretch of the imagination one city more than three miles from another city and separated by the Rio Grande River, which is the boundary between two republics, and also separated by large farms and only twenty-one houses and shacks between the two cities, can be considered as a suburb of the Texas city. It is clear from a reading of the amendment that it was the intention of the legislature to make the Motor Bus Law apply to all operators who use the public highways for transporting persons for hire, and it is not necessary that the transportation be between certain points or that the person transporting persons for hire shall be engaged regularly in the

business. This brought within its provisions the defendants, even though they did not operate regularly but only indiscriminately. This brings us to the point where we feel bound to uphold the law and to sustain the judgment of the trial court."

While all motor vehicles operating for hire on state highways may be required to pay for this privilege, a tax imposed only on interstate business or on such vehicles when operating between fixed termini or over a regular route to the exclusion of all others is invalid, because such a classification is arbitrary and unreasonable, as the court held in the case of *Weimer Storage Co. v. Dill*, 103 N. J. Eq. 307, 143 Atl. 438: "A tax upon the use of highways in interstate commerce is, in substance, a tax upon the transportation of the goods or persons carried, and is obviously a burden upon such interstate commerce, and an interference with the power of congress in that behalf. The carriage of persons is of course just as much interstate commerce as the carriage of goods. * * * A tax may be imposed upon carriers, including those engaged in interstate commerce; but it is not a reasonable classification to impose the tax on interstate carriers or commercial vehicles and exempt like carriers who operate entirely within the state. Nor does it appear to be a reasonable classification to tax commercial vehicles operating 'between fixed termini or over a regular route,' and to exempt all others, including the innumerable delivery trucks, many of which (such as those delivering building materials) carry heavy loads."

While the state may not tax interstate commerce as such it may impose a reasonable tax on motor vehicles operating in interstate commerce over its highways for the privilege of using them, as is indicated in the case of *Teche Lines, Inc. v. Board of County Superiors (Miss.)*, 142 So. 24, where the court said: "By this statute it effectually says to the bus lines, 'Here are our highways, built at enormous public expense; you may use them for carrying on your business, convert them, in part, into a means of enriching your treasuries. The protecting police power of the state is at your disposal. You will be protected from unreasonable competition.' The sovereign grant vouchsafing these special privileges is the 'certificate of convenience'—the franchise. Merely because defendant's buses are engaged in both intrastate and interstate business does not deprive the state of the right to tax the franchise conferring authority to operate in intrastate transportation. It is not a tax on interstate commerce. * * * Defendant's asserted right to relief from taxation because the highway was built at the joint cost of both the

state and United States, and hence is designated as a federal-state highway, is denied in *Alward v. Johnson*, Treas., 282 U. S. 509, 51 Sup. Ct. 273, 75 L. ed. 496, 75 A. L. R. 9. Lastly, it is contended that the franchise or certificate does not grant to defendant the exclusive right to operate its business over said highway; that this is the controlling question determining value."

In levying a reasonable tax on motor vehicles operating in interstate commerce for the privilege of using its highways, the state may graduate the tax according to ton-miles and require an additional reasonable permit-fee to cover the cost of administering its regulations, and while the tax for hauling freight may be graduated and increased with the weight and load of the motor vehicle the tax on passenger vehicles may be static, because of the difference in the nature and extent of the use and damage to the highways of the two classes of service. For the same reason the state may exempt from these taxes motor vehicles carrying less than three tons in weight and those used exclusively in transporting dairy and other farm products to the market. In observing that farmers as a class are entitled to special consideration because the highways were originally built and maintained largely for them and at their expense and they are still contributing substantially more than other classes in the amount of general taxes, the court discussed this principle in an interesting and convincing manner as follows in the case of *State v. Public Service Comm. (Wis.)*, 242 N. W. 668: "In the first place, there can be no doubt that the tax imposed is for the exact purpose declared by the law, namely, a compensation for the use of the public highways and their maintenance and repair. Such a charge may be made by the state when it is clear that the charge imposed is for the use of the highways. While this purpose on the part of the state may appear in many different ways, it can appear with no greater certainty than when the tax imposed is in the nature of a ton-mile tax, which is a tax imposed in exact proportion to the use made of the highways. The fact that the tax here imposed is a ton-mile tax is the most indubitable evidence that the tax imposed is for the legitimate purpose of compensating the state for the use of its highways. When such is the case it matters not what the state does with the money it receives. * * * This law, however, exacts a charge separate and apart from the ton-mile tax. It exacts a permit fee from all those who come under the provisions of the act. * * * Our conclusion that the permit-fee of five dollars can be justified on the ground that it is a reasonable charge

made for the purpose of covering the expense of administering the law renders it unnecessary for us to consider whether it may be justified as proper compensation for the use of the highways in addition to the ton-mile tax imposed. * * * The tax imposed upon vehicles for the transportation of passengers is static, while the tax imposed upon vehicles used for the hauling of freight is graduated and increases with the weight of the vehicle. This is no doubt due to the belief of the legislature that the damage done the highways by trucks hauling dead weight freight increases in proportion to the weight of the load—a fact which is not true with reference to vehicles hauling passengers. The court can not say that this classification is not supported by any reasonable basis. * * * This principle affords ample justification for the exemption from this tax of all vehicles of less than three tons in weight. The next challenged exemption is: 'Motor vehicles, trailers or semi-trailers used or operated exclusively in transporting or delivering dairy or other farm products between the point of production and the primary market.' This is obviously an exemption prompted by the state's consideration of one of its most basic industries and one upon which the prosperity of the state greatly depends. Not only this state, but the nation as well, has become solicitous concerning the stern realities facing the agricultural and agrarian population of the country. The economic pressure upon the farmers has given concern to all who realize that a well-balanced economic condition can not lay out of consideration the welfare and the prosperity of the farmer. This fact finds ample illustration in the governmental favors extended to the farming classes which have recently been sustained by the courts, many of which were reviewed and pointed out in *Northern Wisconsin Co-operative Tobacco Pool v. Bekkedal*, 182 Wis. 571, 197 N. W. 936. Where the general prosperity of the state is so interwoven with and dependent upon the prosperity of the farmer, the legislature, under the broad powers which it enjoys of selecting and classifying subjects for taxation may very well relieve the farmer from a tax imposed upon those who make an extraordinary use of the highways. The highway is an institution made necessary in large part by the fact that we have farms. In the beginning they were laid out and opened up largely for the benefit of the farmer and constituted an absolute necessity for his social existence. The use which he makes of them today is very much the same that he has traditionally made of them. By and large, he makes a much greater contribution to their construction and maintenance by virtue of his prop-

erty tax than do those who make use of them for new and modern purposes. These and many other considerations which might be mentioned fully justified the legislature in exempting the farmers from this tax while using the highways in moving the products of the farm to their primary market."

Reasonable regulations and charges for the use of the state highways may be imposed and collected on motor vehicles operating for hire over the streets and highways of the state, whether engaged in intrastate or interstate commerce, as the interstate carrier has no better right than the intrastate one to use the improved highways of the state without its consent or without paying for the privilege. While a bond may be required as a protection against injuries from negligence to persons within the state, a requirement that a bond be furnished for the protection of freight or passengers being carried beyond the state and in interstate commerce is a regulation of interstate commerce and has no relation to the use of the roads or the safety of the public of the state, and is therefore invalid, because in violation of the federal Constitution; nor can it be required that a private carrier engaged in interstate commerce submit to regulation as a common carrier. A regulation requiring the payment of a reasonable mileage tax by all motor vehicles operating between fixed termini, in exchange for the privilege of using the improved highways, will be sustained on both intrastate and interstate business. These principles were enunciated and discussed in part as follows in the case of *Johnson Transfer & Freight Lines v. Perry*, 47 Fed. (2d) 900, P. U. R. 1931C, 308; "In the present revolutionized traffic by motor vehicles over paved roads, the expensively improved highway belonging to the public is used. The right of the state furnishing it to select the traffic to be done over it, and to protect not only the public in its use but the highway itself, and to obtain compensation for this use, and contribution for its upkeep, is undoubted, and this right of necessity very greatly extends the control by the state over commerce of all sorts upon it, and the taxes and other charges which it may make against all users, whether engaged in intrastate or interstate commerce. See *Hendrick v. Maryland*, 235 U. S. 610, 35 Sup. Ct. 140, 59 L. ed. 385; *Kane v. New Jersey*, 242 U. S. 160, 37 Sup. Ct. 30, 61 L. ed. 222, which did not involve the business of carriage; and *Packard v. Banton*, 264 U. S. 140, 44 Sup. Ct. 257, 68 L. ed. 596, and *Interstate Busses Corp. v. Blodgett*, 276 U. S. 245, 48 Sup. Ct. 230, 72 L. ed. 551, which did involve such business. The older cases concerning carriers

in interstate commerce can not be applied without careful consideration of this new element. For illustration, the state of Georgia could not require a license nor a tax of a railroad carrier for the mere privilege of carrying interstate freight over the company's own tracks in Georgia, but it certainly could if that carrier wished to use the tracks built and owned by the state from Atlanta to Chattanooga. So the state may license or refuse to license, may condition or charge for, the use of its improved roads, when they are turned from their common uses and purposes to the carrier's business. *Schlesinger v. City of Atlanta*, 161 Ga. 148, 129 S. E. 861; *Packard v. Banton*, 264 U. S. at page 144, 44 Sup. Ct. 257, 68 L. ed. 596. The interstate carrier has no better right than any other to use the state's improved highway without its consent, or without paying for it. We accordingly think that the certificate of public convenience and necessity, with a reasonable fee therefor, and an annual license fee for the trucks, are legally demandable as a nondiscriminatory prerequisite of the use of the highway for carrier purposes, even though the commerce involved is wholly interstate. *Clark v. Poor*, 274 U. S. 554, 47 Sup. Ct. 702, 71 L. ed. 1199. No question of arbitrary or discriminatory refusal is here involved. * * * The requirement of the Georgia act that a bond be given to protect the owner of the freight transported, in addition to one to answer to the public for negligent injuries, is unconstitutional as applied to these complainants. They offer to give the latter bond for the safety and protection of the public of Georgia. The state of Georgia has no call to meddle with their patrons in Alabama and Tennessee. The bond for their protection touches only their contracts of carriage, and to require it is clearly a direct regulation of interstate commerce, having no relation to the safety or convenience of the Georgia public, or to the use of the roads. Compare *Sprout v. South Bend*, 277 U. S. 164, 48 Sup. Ct. 502, 72 L. ed. 833, 62 A. L. R. 45. So the exaction of a promise to obey all the requirements of the Georgia statutes and the regulations of the commission as a condition of issuing the certificate and license is unconstitutional. Besides the matter just discussed, others of the requirements can not be constitutionally imposed on an interstate carrier, and a promise to submit to them can not be demanded. The act seems to require a private carrier to become subject to the regulations and obligations of a common carrier, which could not be required of the complainant, *Self. Michigan Commission v. Duke*, 266 U. S. 570, 45 Sup. Ct. 191, 69 L. ed. 445, 36 A. L. R.

1105. We think on the other hand that the deposit of seventy-five dollars to secure the tax of three-fourths cents per mile is demandable. * * * The equal protection clause of the Fourteenth Amendment is not violated by confining the tax to motor carriers having fixed termini. It may or may not be true that the vagrant carriers get as much benefit from, and do as much damage to, the road on the whole, as the constant user of a particular route, but the business of the latter is apt to be more extensive, more regular, and more profitable, and their tax is more readily checked and collected. The difference is like that between a storekeeper and a peddler, or between a railroad and a dray line. We can not say the classification is arbitrary. * * * Despite this being called an occupation tax, it is in substance a tax to compensate for the use of the road. It is in addition to the truck license charge. While the fees for the certificate are appropriated to the expense of executing the Motor Vehicle Act by its own provisions, and the license tax is so used in practice, this mileage tax is a general fund. * * * The mileage tax is not shown to be actually burdensome to interstate commerce. For aught we know it is well worth to the owner the seventeen and one-fourth cents charged for his truck to travel the twenty-three miles in Georgia over a paved highway instead of an unpaved dirt road. * * * Considering the great damage done by freight trucks continually using the same road, and the great benefit to the carrier thus provided with a track which he does not have to maintain, or pay property taxes on, it is just that such carrier should, in proportion to his use of the road, contribute to the public treasury which maintains it. If carriers, both interstate and intrastate, can not be made so to contribute, the federal-aid roads will soon be appropriated by them. * * * Following this strict construction of the word 'tolls,' we hold this a tax and valid. By section 22 of the Motor Carriers Act (Acts Georgia 1929, p. 302), each section is independent and to be enforced, though others are ineffective. It follows that complainants are justified in operating without certificates and truck license only so long as these are withheld on account of their refusal to give the bond and make the agreement which we have held to be not demandable of them."

A tax of one cent a mile on motor vehicles for the privilege of operating as common carriers over the highways of the state while engaged in interstate commerce is sustained as being a reasonable and proper charge for such a privilege in the case of *Interstate Busses Corp. v. Blodgett*, 276 U. S. 245, 72 L. ed. 551,

48 Sup. Ct. 230, P. U. R. 1928C, 144, where the court spoke as follows: "The appellant has already complied with the general statutes of Connecticut requiring the registration of motor vehicles. Part 2, section 1, of the act in question imposes a tax of one cent for each mile of highway traversed by any motor vehicle used in interstate commerce 'as an excise on the use of such highway.' By part 2, section 4, the proceeds of the tax are to be applied to the maintenance of public highways in the state. Appellant objects to the tax as an infringement of the paramount power of congress to regulate interstate commerce or at least as a discrimination against that commerce. It is not denied that a state may impose a registration or license fee on those using motor vehicles in the state, although engaged in interstate commerce, or that the state may impose a reasonable charge for the use of its highways by motor vehicles so employed (*Hendrick v. Maryland*, 235 U. S. 610, 59 L. ed. 385, 35 Sup. Ct. 140; *Kane v. New Jersey*, 242 U. S. 160, 61 L. ed. 222, 37 Sup. Ct. 30; *Clark v. Poor*, 274 U. S. 554, 71 L. ed. 1199, 47 Sup. Ct. 702), and there is no evidence that the tax here is in itself an unreasonable charge for the privilege. * * * The two statutes are complementary in the sense that while both levy a tax on those engaged in carrying passengers for hire over state highways in motor vehicles, to be expended for highway maintenance, one affects only interstate and the other only intrastate commerce. Appellant plainly does not establish discrimination by showing merely that the two statutes are different in form or adopt a different measure or method of assessment, or that it is subject to three kinds of taxes while intrastate carriers are subject only to two or to one."

While motor vehicles operating as common carriers on highways may be taxed for the privilege of doing so, although carrying interstate passengers for a distance of ten miles or more within the state where the tax is reasonable, an excessive tax is invalid as an interference with interstate commerce, for as the court said in the case of *Interstate Transit v. Lindsey*, 283 U. S. 183, 75 L. ed. 953, 51 Sup. Ct. 380: "While a state may not lay a tax on the privilege of engaging in interstate commerce (*Sprout v. South Bend*, 277 U. S. 163, 72 L. ed. 833, 62 A. L. R. 45, 48 Sup. Ct. 502), it may impose even upon motor vehicles engaged exclusively in interstate commerce a charge, as compensation for the use of the public highways, which is a fair contribution to the cost of constructing and maintaining them and of regulating the traffic thereon. * * * A detailed examination of the

statute under which the tax here challenged was laid makes it clear that the charge was imposed not as compensation for the use of the highways but for the privilege of doing the interstate bus business. * * * The tax is proportioned solely to the earning capacity of the vehicle. Accordingly, there is here no sufficient relation between the measure employed and the extent or manner of use, to justify holding that the tax was a charge made merely as compensation for the use of the highways by interstate buses."

§ 796. Limitation of state regulation of interstate commerce.

—A limitation on this doctrine of state control over interstate commerce of motor vehicle business is established in the case of *Liberty Highway Co. v. Michigan Public Utilities Comm.*, 294 Fed. 703, where the court held that the requirement of giving an indemnity bond or liability insurance constituted a direct burden on interstate commerce and was accordingly invalid. In the course of its opinion the court said: "It follows that such provisions of the act as are confined in their application to regulation of common carriers in connection with the public highways are not a direct burden upon interstate commerce, even though they may incidentally affect interstate commerce, but any provisions which are not so confined constitute an attempt by the state to regulate, and therefore to unduly burden, interstate commerce, and they are for that reason in contravention of the federal Constitution, and void. * * * The provisions of section 7, providing for insurance and for indemnity bonds for the protection of persons and property carried, are a direct burden upon interstate commerce, and are for that reason void. The provisions of both sections are separable from and independent of the remainder of the act, and so do not affect its validity. *Interstate Motor Transit Co. v. Kuykendall* (D. C.), 284 Fed. 882."

The state may not impose upon one, transporting merchandise for a single manufacturer located in Michigan into another state, the duty of using his motor vehicles as a common carrier, thereby preventing his using them exclusively to perform his contract with such manufacturer; nor may it impose upon him the duties of a common carrier or subject him to the obligation of furnishing an indemnity bond as a condition precedent to the performance of his contract in transporting such merchandise from one state into another, because this would constitute an unlawful burden on interstate commerce. The state has not the power to regulate motor vehicles of a private carrier in the performance of a contract to transport merchandise for a single manufacturer

over the highways of such state into an adjoining state, because this constitutes interstate commerce and would require a private carrier to perform the duties of a common carrier, as the court in the case of *Michigan Public Utilities Comm. v. Duke*, 266 U. S. 570, 69 L. ed. 445, 45 Sup. Ct. 191, decided January 12, 1925, said: "This court has held that, in the absence of national legislation covering the subject, a state may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles,—those moving in interstate commerce as well as others; that a reasonable, graduated license fee imposed by a state on motor vehicles used in interstate commerce does not constitute a direct burden on interstate commerce, and that a state which, at its own expense, furnishes special facilities for the use of those engaged in intrastate and interstate commerce, may exact compensation therefor, and, if the charges are reasonable and uniform, they constitute no burden on interstate commerce. *Hendrick v. Maryland*, 235 U. S. 610, 622, 59 L. ed. 385, 390, 35 Sup. Ct. 140; *Kane v. New Jersey*, 242 U. S. 160, 167, 61 L. ed. 222, 226, 37 Sup. Ct. 30. Such regulations are deemed to be reasonable and to affect interstate commerce only incidentally and indirectly. But it is well settled that a state has no power to fetter the right to carry on interstate commerce within its borders by the imposition of conditions or regulations which are unnecessary and pass beyond the bounds of what is reasonable and suitable for the proper exercise of its powers in the field that belongs to it. * * *

And it is a burden upon interstate commerce to impose on plaintiff the onerous duties and strict liability of a common carrier, and the obligation of furnishing such indemnity bond to cover the automobile bodies hauled under his contracts as conditions precedent to his right to continue to carry them in interstate commerce. See *Barrett v. New York*, 232 U. S. 14, 33, 58 L. ed. 483, 491, 34 Sup. Ct. 203. Clearly, these requirements have no relation to public safety or order in the use of motor vehicles upon the highways, or to the collection of compensation for the use of the highways. The police power does not extend so far. It must be held that, if applied to plaintiff and his business, the act would violate the commerce clause of the constitution. Moreover, it is beyond the power of the state by legislative fiat to convert property used exclusively in the business of a private carrier into a public utility, or to make the owner a public carrier, for that would be taking private property for public use without just compensation, which no state can do consistently

with the due process of law clause of the Fourteenth Amendment."

The state may not refuse a certificate of convenience and necessity to one operating motor vehicles for hire over its highways and into an adjoining state when engaged exclusively in interstate commerce, for the purpose of preventing competition. In the case of *Buck v. Kuykendall*, 267 U. S. 307, 69 L. ed. 623, 45 Sup. Ct. 324, March 2, 1925, the plaintiff was permitted to operate motor vehicles, engaged as common carriers exclusively in interstate commerce, between Portland, Oregon, and Seattle, Washington, although he had been denied this right by the court below, which in turn had sustained the action of the public utilities commission in refusing him this right in order to prevent competition. In the course of its decision, in reversing the court below, the United States Supreme Court indicated that it did so because the effect of the decision below was to perpetuate a monopoly of interstate commerce, which constituted not merely a burden but an obstruction of it, and was not a regulation of the use of the highways of the states involved. In the course of its opinion to this effect the court said: "It may be assumed that section 4 of the state statute is consistent with the Fourteenth Amendment; and also, that appropriate state regulations, adopted primarily to promote safety upon the highways and conservation in their use are not obnoxious to the commerce clause, where the indirect burden imposed upon interstate commerce is not unreasonable. Compare *Michigan Public Utilities Commission v. Duke*, 266 U. S. 570, 69 L. ed. 445, 45 Sup. Ct. 191, decided January 12, 1925. The provision here in question is of a different character. Its primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. It determines not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons while permitting it to others for the same purpose and in the same manner. Moreover, it determines whether the prohibition shall be applied by resort, through state officials, to a test which is peculiarly within the province of federal action,—the existence of adequate facilities for conducting interstate commerce. The vice of the legislation is dramatically exposed by the fact that the state of Oregon had issued its certificate, which, despite existing facilities, declared that public convenience and necessity required the establishment by Buck of the auto stage line between Seattle and Portland. Thus, the provision of the Washington statute is a regulation,

not of the use of its own highways, but of interstate commerce. Its effect upon such commerce is not merely to burden but to obstruct it. Such state action is forbidden by the commerce clause. It also defeats the purpose of congress expressed in the legislation giving federal aid for the construction of interstate highways."

The state may impose a fee or license tax on foreign-owned motor vehicles operating as common carriers, even though they are engaged exclusively in interstate commerce, where the taxes are fair and reasonable charges for the privilege of using the highways and for the cost of building and maintaining them, for as the court said in the case of *Interstate Trucking Co. v. Dammann* (Wis.), 241 N. W. 625: "So, in the case at bar, * * * there exist such evident differences between the modes of doing business by owners operating for hire vehicles, which are within the first class, and owners operating in their own business, and not for hire, similar vehicles, which are within the second class, that judicial interference with the manner in which the legislature has exercised its discretion in arriving at such classification would be improper. * * * The Wisconsin statutes considered in their entirety fully meet the test thus imposed. As a matter of state bookkeeping the registration fees are first paid into the general fund. But parallel to this payment into the general fund is section 240.49, Stats., which appropriates 'an amount equal to' the total registration fees to the highway commission for allocation as there prescribed. The provisions of section 20.49, Stats., as amended by chapter 22, Laws of 1931, fail to disclose any allocation which is not for a legitimate highway purpose. * * * As the net proceeds of the fees required by the statutes under consideration are in fact virtually all used for highway purposes, it follows that they constitute but compensation for the use of the highways. Consequently, the fees can be exacted of foreign-owned motor vehicles even though they are engaged exclusively in interstate commerce."

The state may not levy a tax on motor vehicles operating over its highways as private contract carriers while engaged in interstate commerce, when the tax is levied on the entire gross revenues of such private carrier because this constitutes a direct burden on interstate commerce in conflict with the federal Constitution. Nor may the state levy a tax on such private carrier and at the same time exempt a farmer or dairyman, hauling farm and dairy-products for hire, and lumber and log haulers, transporting these products to the market, because such a classi-

fication is arbitrary and unreasonable, as each is a private carrier operating his motor vehicle over the highways for hire. This principle is discussed and the distinction denied as follows in the case of *Nutt v. Ellerbe*, 56 Fed. (2d) 1059: "Here the plaintiff is a private contract carrier for compensation. The state imposes upon him, for hauling freight and property over the highways of the state, a tax; but a farmer may haul farm products for compensation, a dairyman may haul dairy products for compensation, and lumber haulers may haul lumber and logs from the forests to shipping points for compensation, and are not required to pay any taxes or be subject to the regulations provided in the act. We can perceive no reason whatever why the one should be taxed and not the others. They are all private contract carriers and not common carriers; they all use the highways of the state; they all obtain compensation for their services; and they all carry freight and property. The mere fact that the carrier in one case is a farmer or a dairyman hauling dairy or farm products, or a lumber hauler transporting lumber and logs, while in the plaintiff's case he is transporting various other kinds of property, furnishes no valid ground for discrimination. Indeed, under the terms of the act, the plaintiff can not even haul farm or dairy products, or lumber from the forests to shipping points, without paying the tax. No valid reason can be suggested why a tax should be imposed in one case and not in the other. It is unnecessary to enter into any discussion of the numerous cases upon the subject of the right of the state to classify for taxation. It is sufficient to say that we think this case is controlled by the principles announced by the Supreme Court in *Smith v. Cahoon, Sheriff*, 283 U. S. 553, 51 Sup. Ct. 582, 75 L. ed. 1264. We do not consider it necessary to decide now whether the other exemptions mentioned in the statute would render it unconstitutional or not; but we do hold that the exempting of farmers, dairymen, and lumbermen renders the statute invalid as to this plaintiff. * * * There is not a syllable in the act to indicate that the legislature meant to confine the exemption to those engaged in hauling their own products. Indeed, if such was the intention, the provision for such exemption would be entirely superfluous, for the act, by its very terms, does not apply to those engaged in hauling their own products, but only to those who are carriers for compensation. The plaintiff contends also that the Act of 1931 lays a tax upon gross revenues, and that inasmuch as the plaintiff is engaged in interstate business, the act as applied to him is in conflict with the

Constitution of the United States because it constitutes a direct burden upon interstate commerce. We think this contention must be sustained. The statute might have been drawn so as to reach only the revenue derived from operations within South Carolina, but it was not so drawn, and if applied at all, must be applied in accordance with its language, which taxes the entire gross revenues of the plaintiff, including his entire interstate business. The act therefore constitutes a direct burden upon interstate commerce, and as applied to the plaintiff, is in conflict with the Constitution. The decisions of the Supreme Court of the United States fully sustain the plaintiff in this contention."

A state, for example, can not impose a tax on the use of gasoline purchased and delivered in another state for use in the operation of an interstate ferry between the state in which the gasoline was purchased and the state seeking to levy the tax because it is a direct tax on a necessary instrumentality of interstate commerce, the same as the use of a locomotive or other railway equipment employed in such commerce or upon the ferry boat itself. This principle is established and discussed as follows in the case of *Helson v. Commonwealth of Kentucky*, 279 U. S. 245, 73 L. ed. 683, 49 Sup. Ct. 279: "This is an action brought by the Commonwealth of Kentucky against plaintiffs in error to recover an amount levied under section 1, chapter 120, Acts 1924, which imposes a tax of three cents per gallon on all gasoline sold within the commonwealth at wholesale. * * * Plaintiffs in error are engaged in operating a ferryboat on the Ohio River between Kentucky and Illinois. They do an exclusively interstate business. They are citizens and residents of Illinois. Their office and place of business and the situs of all their personal property is in that state. The motive power of the boat is created by the use of gasoline, all of which is purchased and delivered to plaintiffs in error in Illinois. It is stipulated that seventy-five per cent of this gasoline was actually consumed within the limits of Kentucky, but all of it in the making of interstate journeys. * * * Regulation of interstate and foreign commerce is a matter committed exclusively to the control of congress, and the rule is settled by innumerable decisions of this court, unnecessary to be cited, that a state law which directly burdens such commerce by taxation or otherwise, constitutes a regulation beyond the power of the state under the constitution. It is likewise settled that transportation by ferry from one state to another is interstate commerce and immune from the interference of such state legislation. * * * The statute

here assailed clearly comes within the principle of these and numerous other decisions of like character which might be added. The tax is exacted as the price of the privilege of using an instrumentality of interstate commerce. It reasonably can not be distinguished from a tax for using a locomotive or a car employed in such commerce. A tax laid upon the use of the ferryboat would present an exact parallel. And is not the fuel consumed in propelling the boat an instrumentality of commerce no less than the boat itself? A tax which falls directly upon the use of one of the means by which commerce is carried on directly burdens that commerce. If a tax can not be laid by a state upon the interstate transportation of the subjects of commerce, as this court definitely has held, it is little more than repetition to say that such a tax can not be laid upon the use of a medium by which such transportation is effected."

§ 797. **Withdrawing certificates of convenience and necessity only for cause.**—A certificate of convenience and necessity when issued by the state for the operation of motor vehicles as common carriers for a period fixed by the statute can not be withdrawn except for cause consisting of the violation of some statutory provision. The fact that such service is no longer necessary is not sufficient cause to revoke the permit prior to the expiration of the period for which it was issued as was decided in the case of *State v. Fortney*, 93 W. Va. 292, 116 S. E. 753, P. U. R. 1923D, 524, where the court said: "The respondents can not now revoke that permit without cause. Under the statute, 'Permits, when granted, shall be good until the first day of January next following, and may be renewed at their expiration unless for some good cause the commission or other licensing authority shall refuse to reissue the same.' The only cause given in the statute for revocation of the permit is violation of some of its provisions. Respondents have attempted revocation of this permit, not on the ground that petitioners have been guilty of any such violations, but upon the mere theory that the White Transportation Company is in a position to take care of all the business; and this idea is presented by respondents in the face of the evidence showing, as their return admits, the public demand and necessity of the service to be rendered by petitioners under such permit."

The right of the state to regulate motor vehicles operating on its highways for hire may be in the interest of safety and to prevent unnecessary traffic or interference with the present service or as a means of raising revenue for highways in exchange

for the privilege of using them. For these purposes and to effect these regulations, certificates of convenience and necessity are required, under which the state may regulate, not only the number of carriers, but their size, weight, speed, schedules and rates. This regulation is usually placed in the hands of the public service commission of the state with power to make such rules and regulations as the public interest may require, and with like power to revoke certificates for failure to comply with these regulations, after notice and a hearing by the commission. These principles are established and discussed as to their application as follows in the case of Southern Motorways, Inc. v. Perry, 39 Fed. (2d) 145, P. U. R. 1930C, 131: "The right of the state to regulate is drawn from two distinct sources, to wit: the nature of the business done, and the use of the public highways. Certain businesses, because of their public interest, are subject to regulation, although their owners exercise no special franchises, and use in them only their own property. *Wolff v. Industrial Court*, 262 U. S. 523, 43 Sup. Ct. 630, 67 L. ed. 1103, 27 A. L. R. 1280. Such a business is the common carriage of passengers or freight. Again, when the public highways are made the place of business, a right to regulate, in the interest of the safety and convenience of the other users of the highways, and of the preservation of the highways themselves, arises independently of the nature of the business done. * * * We treat the complainant as carrying on intrastate commerce only. The bill affirms that the complainant is only a private carrier. The answer avers the contrary. We think the evidence, while meagre on the point, shows the business to be the common carriage of passengers. The powers granted in the charter look to that sort of business. The contracts made for stations and station agents point the same way. * * * The requirement of a certificate of public necessity and convenience is justifiable. Carriers for hire, such as the complainant, whether in all respects common carriers or not, may be put in a legislative class for regulation. It is common knowledge that the expensively improved modern highways, affording a perfect track, untaxed, built, and kept up by the public, have been made the theatre of a passenger and freight-carriage business that has greatly modified the traffic system of the country, and has brought about larger, heavier, and swifter vehicles, that tend greatly to damage the pavements, and on narrow ones become a source of great inconvenience and danger. Profits depend on filling the vehicles, and there is constant temptation to make quick schedules and reach stations ahead of competitors.

Regulation and restriction is imperative. The legislature, through its agency, the public service commission, may determine what sort and how many such vehicles can be used on the roads with safety to the pavement, to their passengers, and to other travelers, and may prefer the ordinary use of the highway to the new use of it for extensive carriage business. It may limit the use of its highways for this purpose, just as it has always limited the use of its power of eminent domain, so as to avoid needless and perhaps disastrous multiplication of railroads.

* * * The fees for the certificate and for the license of each vehicle are in the nature of a tax, justified in the reasonable amounts exacted, as recompense for the special use, for the purpose of gain, of the highways. *Hendrick v. Maryland*, 235 U. S. 610, 35 Sup. Ct. 140, 59 L. ed. 385. * * * This brings us to the regulation by restriction of the schedules. Such a regulation appears to have a double source, partly for the convenience of the public in having certain and regularly spaced schedules and partly in the interest of safety on the road in not having too many or too speedy ones. No serious question of the power to regulate in these respects seems possible, unless the regulation be arbitrarily done. * * * It is not apparent that arbitrary discrimination has been practiced against complainant. From what has been said, it follows that the certificate of public necessity and convenience can be revoked if the complainant fails to observe lawful regulations, or if circumstances arise rendering it detrimental to the public to continue it. The statute permits such revocation only after hearing. Such a hearing is now imminent before the commission. There is no reason to doubt that it will be fairly conducted and result in a just order. No constitutional right of the complainant is to be denied to prevent which this court should act."

§ 798. Revocation of certificate secured through fraud or misrepresentation.—Where a certificate of convenience and necessity was secured through fraud or misrepresentation, however, it may be revoked for such reason upon discovery of the fact by the authority issuing it. As was held in the case of *Knowles v. Kuykendall*, 122 Wash. 315, 210 Pac. 666, P. U. R. 1923B, 190, regarding such right of revocation under a rule of the commission to the effect that it may be withdrawn, the court said: "Under this rule, as well as under the statute itself, the department had a perfect right, upon complaint being made, to investigate the conditions under which the certificate of necessity had been issued to the appellant, and if it found that he had procured

it by means of misrepresentations, the department would have a right to annul and cancel it."

§ 799. Police power as basis of regulation and control.—In the case of *Haddad v. State*, 23 Ariz. 105, 201 Pac. 847, P. U. R. 1922B, 124, the Supreme Court of that state in line with the other jurisdictions held that: "The control which, under the police power of the state, may be exercised over automobiles carrying persons or freight for hire over the public ways, has received consideration in many of the decided cases. As being a legitimate exercise of the police power of the state, whether exercised directly by the legislature or by the municipalities, or other governmental agencies under delegated powers, regulations of various kinds over automotive transportation on the public highways have been upheld."

Motor vehicles, operating over the state highways as common carriers of passengers, who are required to pay for the privilege of using the highways may not object to the exemption of private carriers and those carrying perishable farm products or livestock "in cases of emergency" or those who only make "occasional trips" thereon, for as the court said in the case of *East Tennessee &c. Motor Transp. Co. v. Carden* (Tenn.), 50 S. W. (2d) 230: "The record before us does not present any issue involving rights of a private carrier, and it is therefore immaterial to the appellants whether the statute regulates such carriers or not. If the proper construction of the statute would operate to deny due process of law to private carriers, the appellants, in the conduct of their business as common carriers, are not adversely affected thereby, and therefore are not entitled to question the constitutionality of the statute on that ground. * * * The exemption in favor of those who carry perishable farm products or livestock to market is expressly restricted to 'cases of emergency,' and this restriction presupposes or assumes that the beneficiaries of the exemption are not engaged in the business of carrying or transporting such commodities. The exemption is extended in the same section of the Code (section 5477) to all 'carriers of either freight or passengers who make only occasional trips,' and we can not assume that one who transports perishable farm products or livestock to market only in cases of emergency would be other than one who only makes occasional trips. There is certainly no arbitrary or unreasonable discrimination in this provision of the statute. The transportation of milk and milk products from producer to purchaser is not a business which can ordinarily constitute the

operator a common carrier. There is no evidence in the record on this point, and we do not judicially know that any persons in this state engage in such business in such way as to constitute them common carriers of milk and milk products. If so, the business possesses characteristics peculiar to itself, and we do not doubt the existence of conditions constituting reasonable grounds for its legislative exemption from the application of the statute. 'One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.' *City of Memphis v. State ex rel. Ryals*, 133 Tenn. 83, 179 S. W. 631, 633, L. R. A. 1916B, 1151, Ann. Cas. 1917C, 1056. In any event, we can see in this exemption no adverse discrimination as against the appellants whose business is confined to the transportation of persons."

The state may impose a reasonable registration fee or charge on all motor vehicles using its highways, although some may not be residents of the state, because the charge is for the privilege of using the highways by all, regardless of the place of their residence, for as the court said in the case of *Bailey v. Smith*, 40 Fed. (2d) 958: "It is a recognized rule in the federal courts that the regulation of motor vehicles is an exercise of the police power of the state, and that the state has a right, without being charged with discrimination as against a nonresident, to require all persons who use the highways of that state to comply with its registration laws. * * * If claimant then is not a resident of some state, the District of Columbia, a territory, or a country other than the United States, he is not a nonresident within the meaning of the registration law. The statute expressly so states. It is true that in one sense a tract of land owned by the government known as Ft. Des Moines is a federal district, that is, it is a 'district' in that it comprises a particular tract of real estate, and it is 'federal' in the sense that it is owned and controlled by the United States government. * * * The military reservation of Ft. Des Moines is practically in the center of the state of Iowa, and anyone living at the army post and using an automobile, must necessarily use it mostly on the highways of the state of Iowa. It is apparent that the claims made in the complaint are far fetched, and the 'law' of the army post so apparently a subterfuge to endeavor to circumvent the plain wording and meaning of the statutes that have reference to the requirement that all users of the highways of the state of Iowa

should have a bona fide registration, that further comment is unnecessary."

Under its police power, the state may regulate and control motor vehicle traffic for hire in the interest of the public safety and as a matter of regulating and limiting the service, although private carriers may not be subject to such regulation where the statute is limited to service by common carriers, as is indicated in the case of *Stone v. Underseeth*, 85 Mont. 11, 277 Pac. 437, P. U. R. 1929E, 675, where the court said: "The regulation of motor transportation for the protection of the public is a legitimate and wise exercise of the police power of the state, and courts generally have not been inclined to excuse the increasing number who earn their livelihood by the use of the public highways for the transportation of persons and property for hire from the responsibilities of common carriers on merely technical grounds, and they are particularly slow to excuse them when the plan of operation bears evidence of a studied attempt to reap the rewards of common carriers without incurring the corresponding liabilities. * * * In the case at bar, the evidence fully warrants the court's findings to the effect that defendants have regularly covered the route described in plaintiff's permit for the purpose of obtaining freight and passengers for transportation for hire as a business, and have so timed their trips as to secure the business in advance of plaintiff's scheduled trips; this being established as a fact, it is immaterial that their major activities and the reasons for their maintaining motor trucks at Gould and over the route mentioned were a mail contract and employment by the New Gould Mining Company to stand in readiness to meet any emergency that might arise at the mines and to haul heavy machinery and high explosives, for which work plaintiff was not equipped. If these major activities constitute operations as a private carrier, not subject to regulation by the commission, still, when, on trips made for the mining company, or otherwise, defendants transported passengers at the expense of those carried, whether they were employees of the company or not, or transported property of individuals for hire, not as an isolated transaction for the accommodation of the individual, but generally as a means of livelihood, their activities constituted operations as a common carrier, and this is likewise the effect of calling for and transporting all shipments received at Silver station for the mining company under written direction to the railway company, given by the manager of the mining company, to deliver freight 'to anybody who calls for it.' * * * With re-

spect to the regulation of common carriers, the constitutionality of the act in question, attacked under the 'due process' provision of the constitution, is no longer debatable."

Where the statute limits the regulation to motor vehicles operating as common carriers, the public service commission has no power to regulate the service of a private carrier, whose right to use the highway is subject only to the exercise of the police power of the state in matters of safety and the general welfare of the public. That such a statute does not give the commission the power to convert a private carrier into a common carrier for the purpose of regulating its business is established and discussed as follows in the case of *Weaver v. Public Service Comm.*, 40 Wyo. 462, 278 Pac. 542, P. U. R. 1929D, 625, where the court said: "The main criterion as to whether he is the latter depends upon whether he holds himself out as ready to serve every one of the public alike to the limit of his capacity, and within the sphere of the business carried on by him. * * * We ought not, accordingly, declare the plaintiff in this case a common carrier unless it is reasonably clear that he in fact is one or has held himself out as such. Now there is nothing in the statement of facts before us which in any way whatever indicates that Weaver held himself out to the public generally. * * * Highways exist for the benefit of the members of the public at large, and the only right which the state has to regulate or prohibit their use must be sought in the police power of the state to promote the safety, peace, and general welfare of the people. Unless the liberty to contract to act as private carrier and to seek happiness in that calling interferes with that safety, peace, and general welfare, the legislature has no right to forbid or control it. * * * The effect is that the calling of a private carrier for hire is forbidden. And that is not only true with private carriers which are in competition with common carriers, and not only with those which use the highways to a large extent, but it is true with every private carrier of any kind. No one possessing any motor vehicle may carry anything over the public highways (outside of municipal corporations) for hire without incurring the penalties and undergoing the conditions of the act. * * * We think, accordingly, that the act in question, as it stands, and all of its provisions being interrelated, is wholly unreasonable as applied to private carriers. * * * And while it probably would be unfair to say that the act does not regulate the use of the highways, inasmuch as that very use brought about the legislation, still the main method toward

that end is by compelling all carriers for hire to become common carriers, and submit to the burdens attached to the latter, and that can hardly be said to be an appropriate method for the end in view, at least as to a great portion of private carriers. And by reason of that fact the act in question is really more of an attempt to regulate motor carriers for hire than it is to regulate the highways."

§ 800. Prospective business not considered on granting of permit.—The railroad commission of California, following the general principle of refusing to encourage or permit competition between transportation systems by the installation of motor vehicle service, unless it would be a public convenience and necessity, has ruled that business which the applicant expected to develop in the future was only an expectation or prospect and that it was not sufficient to justify the issuance of a certificate of public convenience and necessity for the present. In the course of its holding the commission in *Re Motor Transit Co.*, P. U. R. 1922D, 495, said: "This commission has clearly heretofore established the doctrine that certificates to operate an auto stage or freight service shall be granted or withheld upon the basis of whether the rights, welfare and interest of the general public will be advanced by the prosecution of the enterprise and not upon the private benefit or advantage that may accrue to any carrier, shipper or consignee. * * * Practically every witness from the communities of the protestant group testified that the service of the Pacific Electric Railway Company is adequate and satisfactory, and that no need or demand exists for the proposed Motor Transit Line. * * * We have given careful consideration to all the evidence in this proceeding, and are of the opinion and find as a fact that the Motor Transit Company has presented no evidence to justify the authorization of its proposed additional passenger and freight service. By its admissions in the record, this applicant concedes that the present demands are so limited that at the outset neither the freight nor the passenger service alone will be profitable and not even self-supporting, but believes that in the future a profitable business may be built up if both are combined. It does not desire the authority to operate one service without the other. A showing of public necessity can not be predicated upon an applicant's belief of what business he may develop in the way of additional traffic between two or more given points. The record shows that the traffic expected to be secured had little or no existence at the time of filing the application, and if present transportation facilities are adequate

there is no public necessity for the establishment of additional service designed to care for business which may or may not materialize in the future. Moreover, this commission has repeatedly held on applications for certificates of public necessity and convenience, particularly where an additional service is proposed which will virtually parallel existing carriers, that a clear and affirmative showing must be made that the existing transportation facilities are inadequate or unsatisfactory."

§ 801. **Jurisdiction of California commission.**—In the case of *Western Assn. of Short Line Railroads v. Railroad Commission*, 173 Cal. 802, 162 Pac. 391, 1 A. L. R. 1455, P. U. R. 1917C, 178, the Supreme Court of California held that their railroad commission had jurisdiction over motor vehicle transportation systems by virtue of the constitutional provision conferring upon it power to regulate and control "railroads and other transportation companies." In the course of its decision, however, to this effect the court indicated that the commission had no control over local transportation systems operating in cities and incorporated towns, the court saying: "Therefore we repeat that one would have no hesitancy in declaring that the language of the constitution in conferring upon the railroad commission power of regulatory control over 'railroads and other transportation companies' embraced within its grant companies of the nature we are considering. And we interrupt our argument here to say that, while the problem is to be resolved solely under the determination of the existence or nonexistence of the power in the railroad commission, no reason appears why such power should not have been conferred upon it, and multitudinous reasons exist why it should have been conferred. These automobile stage companies carry passengers to great distances, over many and devious roads. * * * So construing them this court held, for reasons not calling for repetition, as they are fully set forth in the opinion, that 'other transportation companies' did not embrace within its meaning 'street railway companies carrying passengers for hire within the municipal limits.' But the decision, upon fundamental and familiar principles, decided nothing more than that this particular character of transportation company was not embraced within the purview of the language of the constitution."

The state of California may regulate motor vehicles, public or private, operating for hire on its highways under the authority given its railroad commission; and in doing so, may exclude persons transporting themselves or their own property from such regulation, as the court indicated in the case of *Holmes v. Rail-*

road Commission, 197 Cal. 627, 242 Pac. 486, P. U. R. 1926C, 664: "It is apparent from the other provisions of these 'leases,' and from the manner in which they were performed by the parties, that they are nothing more than contracts for the transportation of merchandise for compensation at the rate of thirty-two and one-half cents per one hundred pounds, subject to a minimum charge of sixty-five cents per shipment. The commission so found and its finding is abundantly supported, if not compelled, by the evidence. The commission did not expressly find upon the issue as to whether or not the petitioners were operating as common carriers, which was alleged in the complaint and denied in the answer. * * * Petitioners contend that this finding must be taken by us as a negative finding upon the allegation that they were operating as common carriers, and we are inclined to agree with this contention. * * * We think it is equally applicable to all persons who seek to make a special and private use of the public highways by transacting their private business thereon and that it applies with equal force to private carriers who engage in the business of transportation for hire upon the public highways. The reason for the rule which authorizes the state to prohibit the private use of the highways by such carriers is not that they are common carriers; it is that they are making a private use of the public highways, which are owned and paid for by the public, and which are open alike to all persons. It is true that common carriers are subject to regulation by the state because the fact that they are engaged in public service causes their business to be affected with public interests, and thus justifies the regulation thereof by public authority. But this is not, as it seems to us, the reason for the existence of the rule. * * * This conclusion is not based, as petitioners assert, upon the power of the state to regulate the use of its highways. It is based upon the power of the state to prohibit the private use of its highways or in its discretion to grant the privilege of such private use upon such conditions as it may see fit to impose. * * * A conclusion somewhat analogous to this is presented in the case of *Producers' Transportation Co. v. Railroad Commission*, 176 Cal. 499, 160 Pac. 59, relied upon by petitioners herein. It was there held that a state has no power by mere legislative fiat, nor even by such fiat embodied in its constitution, to transmute a private carrier into a common carrier. With that conclusion we are in entire accord; but it was also there held that, if a private carrier exercises eminent domain in aid of his transportation business, he will be deemed thereby to

have dedicated his transportation system to a public use and to have thereby become a public carrier. * * * In the present case the petitioners did not enter into the transportation business until long after the enactment of the statute here in question. * * * One who transports merely his own freight over the highway is not a carrier, private or otherwise. He may be a farmer or a manufacturer or a merchant or what not, but the business in which he is engaged is not the business of transportation. He is not a carrier unless he engages in the business of transportation of the persons or property of others for compensation."

§ 802. Statutory provisions and commission regulations of California.—This commission was expressly given general jurisdiction over motor vehicle transportation systems by chapter 213 of the Laws of California for 1917, except those operating locally in cities and towns, and the right to grant or refuse certificates of convenience and necessity to all such systems except those that were established and in operation at the time of the passage of this regulating statute. Under and by virtue of the provisions of this statute the railroad commission in *Re Rates, Fares, Charges, Classifications, Rules and Regulations of Transportation Companies*, P. U. R. 1918B, 297, formulated and established rules in the greatest detail for the operation of such transportation systems, including the issuance of certificates of public convenience and necessity, regulations for the issuing of securities by such systems, the fixing of rates, fares and charges, operating schedules, the sale of tickets, the giving of bonds or indemnity in uniform amounts, all of which are required to be filed with the commission, together with safety rules and regulations which cover all operating conditions for the safety and convenience of the public. In the course of its ruling the commission, in construing this statute and defining its attitude on the regulation of this form of transportation, spoke as follows: "In the first place, the statute draws a distinct line between the power of incorporated cities and the power of the railroad commission with reference to the regulation of transportation by stages and trucks. When such transportation is conducted wholly within the limits of an incorporated city, the municipality has exclusive jurisdiction with reference to the regulation thereof. When, however, such transportation is not confined within the limits of an incorporated city, regulation of such transportation is vested in the railroad commission. This line of demarcation between the powers of incorporated cities and the powers of the railroad commis-

sion was made in accordance with that indicated and approved by the Supreme Court in *Western Assn. v. Railroad Commission*, 173 Cal. 802, 1 A. L. R. 1455, P. U. R. 1917C, 178, 162 Pac. 391. * * * The business of transportation by stage and trucks, while having its origin in California, is still in its early development. We believe that such transportation has come to stay, and that properly developed it will become a very necessary public convenience. In working out, therefore, the matter of the regulation of these transportation companies, we hope for a continuance of the cooperative spirit which has been heretofore displayed. In preparing the rules and regulations governing the operations of these transportation companies, we have had in mind the convenience and safety of the public, and also the convenience of the transportation companies themselves."

The power to license motor vehicles covers the power to revoke the privilege so granted, and a failure to pay for damages caused by negligent operation constitutes sufficient cause for revocation as is indicated in the case of *Watson v. State Division of Motor Vehicles*, 212 Cal. 279, 298 Pac. 481: "The power to license imports the further power to withhold or to revoke such license upon noncompliance with prescribed conditions. In our opinion, the revocation of the privilege for nonpayment of judgments arising from negligent operation of motor vehicles is a reasonable regulation, and one which may well tend to eliminate from the highways persons shown to be dangerous to life and property. There is nothing arbitrary or unreasonable in such a requirement. * * * Nor do we think section 73g, *supra* [Cal. Stat. 1929, p. 561], favors the rich over the poor, and is for that reason, discriminatory. The fallacy in this argument lies in the failure to distinguish between equality of opportunity and ability to take advantage of the opportunity which is offered to all. The equality of the constitution is the equality of right and not of enjoyment. A law that confers equal rights on all citizens of the state, or subjects them to equal burdens, is an equal law. *State v. Griffin*, 69 N. H. 1, 39 Atl. 260, 264, 41 L. R. A. 177, 76 Am. St. 139. So long as the statute does not permit one to exercise the privilege while refusing it to another of like qualifications, under like conditions and circumstances, it is unobjectionable upon this ground. * * * Petitioner also asserts the section is unconstitutional because its application is restricted solely to motor vehicles. Such vehicles have been recognized as properly and reasonably forming a separate class, for legislative purposes and accordingly a statute is not unconstitutional, as being special

legislation, merely because it legislates solely upon the operation of automobiles, and does not attempt to regulate the operation of all vehicles using the public highways. In this connection see the authorities collated in 2 R. C. L. 1171."

Regulation, however, does not ordinarily mean prohibition by the granting of an exclusive certificate, where this is not provided for in the statute or by clear implication, for as the court said in the case of *Arkansas Railroad Comm. v. Independent Bus Line*, 172 Ark. 3, 285 S. W. 388: "It follows, then, that if such authority exists in the railroad commission, it is by necessary implication from language used in the statute. The language is not broad enough to justify the implication. 'Regulation and operation' does not import the right of denial or the right to grant an exclusive franchise or permit which, in effect, involves a denial or the right to grant an exclusive franchise or permit which, in effect, involves a denial to some. 'Regulation' is not synonymous with 'prohibition,' and a delegation of the authority by the legislature to regulate does not imply authority to prohibit. * * * We think the legislature never intended for such an implication to be drawn from the language used in the statute, for the reason that the act in which the section appears specifically repealed section 13 of Act 571 of the Acts of 1919, which conferred authority on the Arkansas corporation commission (now abolished) to grant certificates of convenience and necessity to public service corporations."

§ 803. **Policy of Colorado not indicated by statute.**—As the statute of Colorado fails to define the policy of the state on the question of permitting the introduction of motor vehicles which operate in competition with established railroads, the public utilities commission of this state expressed itself as being at a loss to know what position to assume in determining the matter. The attitude of any particular jurisdiction on such an important question, which is entirely one of policy, might well be expressed and defined by the statutory regulations enacted to cover the subject, as has been done in several states. In the absence of any statutory direction the commission announced itself in favor of motor vehicles operating in competition with steam railroads, expressing itself in no uncertain terms in *Re Colorado Motor Way, Inc.*, P. U. R. 1924A, 56, as follows: "In the absence of a statute to direct or control, the commission is sorely perplexed in the determination of a case like the present. Some of the counsel for respondents contend in their briefs that the applicant must establish the right to a certificate of convenience and ne-

cessity beyond a reasonable doubt. This is absurd. No such rule has been laid down by any utility commission nor promulgated by any court. It would seem to be time for railroad companies to understand that the state does not guaranty a satisfactory return upon utility investments, and further that the automobile is here to stay and that it can not be eliminated by any utility commission nor by any court or legislature; that it is a great industrial fact and must be met and treated as such. The law will not compel a person to ride on a railroad train or forbid him to ride in an automobile if he so desires. Such a policy is inconsistent with the American notion of human liberty." An equally strong dissenting opinion in this holding of the commission sets forth the contrary doctrine in favor of protecting existing systems in its monopolistic position on the theory that it is rendering adequate service, the commissioner saying: "It would be ill advised to say that motor trucks have no place in this day and age. They already occupy a large and ever increasing field and one might just as well attempt to sweep back the tides of the ocean with a broom as to prevent their operation within useful and proper lines. However, this does not mean that they may not, without proper control, become a menace to the very people they seek to serve. While the taking from the railways of both passengers and express business by auto lines is keenly felt by all railroads, it is possible the larger and more prosperous roads of Colorado can withstand this invasion, but this subtraction from some of our weaker lines, already sorely financially depressed, may so seriously handicap them as to compel them to cease operation. The railroads are absolutely necessary to our civilization. * * * The granting of "certificates of public convenience and necessity" to truckers in competition with the railroads, where the latter furnish frequent and adequate train service, as is done in this case, is uneconomic and grossly inequitable from either a public or railroad standpoint. The railroads pay out hundreds of thousands of dollars annually in taxes for the building and upkeep of the public highways they do not use. To say it is just to allow trucking concerns or 'fly-by-night' companies who pay no taxes in the counties through which they operate to use the state and county roads with their heavily loaded and destructive trucks, in competition with the railroads, especially in view of the fact that in many counties they have never contributed a single cent to either the building or upkeep of the roads they so largely destroy is not only grotesque but ludicrous as well."

§ 804. No restrictions in absence of regulation by state or municipality.—Prior to the enactment of the present statute regulating motor vehicle transportation in Michigan the Supreme Court of that state in the case of Grand Rapids, G. H. &c. R. Co. v. Stevens, 219 Mich. 332, 189 N. W. 2, held that in the absence of any rule or regulation by the state or the municipalities, owners of motor vehicles were violating no law or local regulations in operating motor vehicles as common carriers, the court saying: "The defendants operate motor buses and trucks, carrying passengers and freight for hire, using the public streets and highways for that purpose. The defendants have no franchise to operate as common carriers. Their business in a measure is in competition with the plaintiff, although some of them make localities not reached by the plaintiff, and give service to passengers who would not be passengers of the plaintiff company. Because of this competition an injunction is sought. * * * The defendants claim that they have a common right to use the public streets and highways to conduct their business as common carriers by motor buses and trucks, provided they comply with all regulations prescribed by the state or the municipalities through which they operate. They claim the state has no general law regulating common carriers of passengers and freight by motor buses and trucks, and that they have complied with all the rules and regulations prescribed by the municipalities in which they operate; that no rules or regulations have been prescribed by some of the municipalities through which they operate. * * * The defendants are not violating any law of the state nor any rule or regulations of any municipality."

§ 805. Existing systems not considered in Michigan.—As Act No. 209 of the Michigan Public Acts of 1923, enacted to regulate motor vehicles operating as common carriers, did not indicate the policy or attitude of the state on the question of the relation of motor vehicle systems when established operating in competition with existing railroad systems, the court upheld the Michigan public utilities commission in the position that they were not authorized or expected to consider existing systems of transportation in issuing certificates of public convenience and necessity to motor vehicles for the purpose of operating as such. In the case of Rapid R. Co. v. Michigan Public Utilities Comm., 225 Mich. 425, 196 N. W. 518, P. U. R. 1924B, 585, the court on quoting the statute in question, said: "'After thirty days from the effective date of this act, no person, firm or corporation shall engage or continue in the business of transporting persons or prop-

erty, by motor vehicle, for hire, upon or over the public highways of this state, over fixed routes or between fixed termini, or hold themselves out to the public as being engaged in such business, unless and until they shall have obtained from the Michigan public utilities commission a permit so to do, which said permit shall be issued in accordance with the public convenience and necessity and shall not be assignable: provided, that this act shall not apply to carriers operating exclusively within the cities or villages.' The majority of the commission held that the language of this section 'limits the inquiry' as to 'whether a public convenience and necessity exists to the motor vehicle business.' Commissioner Pepper, while then of the opinion that the act 'does not fix any limit on the inquiry,' in the brief filed by him in this court says: 'An examination of the entire act fails to disclose a single word or provision which in any way indicates that the legislature had in mind the establishment of a policy of protecting existing railroad transportation interests as against motor transport interests.' * * * The purpose of the bill as introduced was to regulate the use of such motor vehicles on the highways. The amendment proposed and adopted was germane to such purpose. We find no intention expressed to do more than this. It is a matter of common knowledge that the traffic on many of our highways has become so great that accidents due thereto are frequent and travel much impeded. The act in question is the first attempt on the part of the legislature to restrict the number of motor vehicles using the highways for the conveyance of persons and property for hire. The bill as introduced sought to do so by imposing a privilege tax upon them. The amendment requiring a finding by the commission of public convenience and necessity, thus empowering the commission in the public interest to determine the number of persons, firms or corporations who should be permitted to so operate, was but another step in the exercise of such control. If a permit is asked for to operate such vehicles between points not served by steam or electric roads, the act empowers the commission to apply the test of public convenience and necessity in determining whether it shall be granted. Ordinarily the commission would have but little difficulty in determining the question. If the commission find, under the proofs submitted, that the public will be reasonably well served under a permit or the permits theretofore granted, it may refuse to grant another. Without extending the application of this provision beyond the general scope and object of the act, we have a workable statute, complete in all of its details. To extend it as

contended for by the plaintiffs will open up a field of investigation and lead to possible results which, we feel constrained to hold, were not within the contemplation of the legislature when the bill was passed. * * * The grant of the power to determine whether, in view of the service rendered by other means of transportation, a necessity exists, or the public convenience requires, that a new system of transportation should not be permitted in competition with those operating between certain points, should not be inferred unless the language is fairly expressive of such an intent on the part of the legislature. This is an age of evolution in the transportation business. Steam railroad service greatly reduced the earnings of the vessels carrying passengers and freight, and put the stage coach out of business. Electric cars have much affected the business of the steam roads between certain points. The use of motor vehicles will doubtless decrease the earnings of the electric roads. If it be desirable to clothe the commission with the power to prevent such competition by refusing to permit motor vehicles to operate, when the service rendered by the steam and electric roads is adequate to the needs and convenience of the public, we think the legislature should so provide in no uncertain language."

§ 806. Use of highway as place of business.¹³—Jitneys operating as common carriers whether within or between municipalities constitute an extraordinary use of the streets and highways. The right of a citizen to travel upon the highway and to transport his property in the ordinary course of life and business differs radically from the use of the highway to conduct a private business for profit like the operation of jitneys as common carriers. Such a use is not a matter of right but a privilege or permission which may be granted or withheld. Such use of the streets and highways is subject to regulation and control of the state or by the municipality acting under authority of the state and when permitted it may be subject to such conditions and regulations as the state or municipal corporation may see fit to impose for the best interests of the general public. The operation of such common carriers for profit in the public highways is a special use of them which tends to obstruct ordinary traffic and requires additional construction, maintenance and repairs on such highways, which furnish additional reasons for the regulation and control of such transportation systems.

¹³ This section of third edition quoted in *Seaboard Air Line R. Co. v. Wells*, 100 Fla. 1027, 130 So. 587.

Regulation of motor vehicles operating for hire on the streets and highways of the state may be by license as one of the means of such regulation, and a reasonable tax may be imposed as a method of charging for the use of the highways, and for their construction and maintenance. This principle is clearly established and discussed as follows in the case of *Armstrong v. Johnson Storage & Moving Co.*, 84 Colo. 142, 268 Pac. 978, where the court said: "It is claimed that chapter 135 violates article 20 of the Constitution and the Home Rule Amendment, because it attempts to regulate the use of the streets of the city which by virtue of those amendments are under the city's exclusive control; but if this argument were sound the state could not license automobiles for use in the city at all and so could not issue the license which the writ demands. * * * But we think there is no doubt of the right of the state to regulate the use of automobiles by license even though they never leave the city of Denver. Denver, so far as we are informed, has not assumed the right to license automobiles used within her limits, and until she does so the question of her power to do so is not before us. Plaintiff claims that the fee is excessive, unreasonable, and confiscatory; but he alleges no facts to show it. If he had alleged that value and those amounts, we should have to take them as true. We think the mere statement that the tax is excessive, unreasonable, and confiscatory is a conclusion of law, not admitted by the demurrer. One general rule of pleading is that values and amounts should be specifically stated, and this is always required when they are of the substance of the action. And *Steph. Pl.* (2d ed.), section 198. It is alleged that the act is void because, under cover of a regulatory license, it seeks to exact a tax solely for revenue, but the law requires the fee for license for a privilege, i. e., to use cars on the highway for transportation for hire, and so, even though one of its purposes is revenue, it is valid unless the fee is excessive, unreasonable, or confiscatory. *Smallwood v. Jeter*, 42 Idaho 169, 244 Pac. 149; *Ard v. People*, 66 Colo. 480, 182 Pac. 892. The decisions with reference to the power of municipal corporations are not conclusive with reference to the powers of the state."

Where the highways are being used by motor vehicles as a place for conducting a business for profit, the state, in the interest of the public safety, may regulate and make a reasonable charge for such use of its highways by way of traffic regulations in avoiding unnecessary congestion, unsafe speed and other dangerous operating conditions, and in regulating the amount of the

traffic and the cost of the service demanded by the public convenience and necessity. An order of the railroad commission in granting a certificate for additional service by motor vehicles operating as common carriers may and should be set aside where due consideration was not given to the effect of issuing such a certificate upon the present transportation facilities, because the provisions of the statutes, generally made and provided in this connection, contemplate and frequently expressly require that adequate, existing transportation service shall not be superseded or vitally impaired by additional service from another source. Only in cases where public convenience and necessity require additional service can it be justified, for as the court said in the case of *Florida Motor Lines v. Railroad Comm.*, 101 Fla. 1018, 132 So. 851, P. U. R. 1931C, 510: "The highways being the property of the state, it may make any charge for the use of the roads that is not expressly or impliedly forbidden by the controlling law federal or state. * * * Whether the transportation service for hire proposed to be rendered by motor vehicles over the public highways is essentially similar to that already being rendered, or is materially different in its nature, promptness, convenience, adequacy, or other advantages, from similar service rendered in the territory by established lines of transportation, such similarity or difference and advantages, as well as the conservation and safety of the roads, should be considered in determining whether the public convenience and necessity require particular motor vehicle transportation service for hire over the public highways. Another intent of the statute is that, before a certificate is issued permitting the use of motor vehicles on the public roads in the business of transportation for hire, it shall be affirmatively shown by appropriate evidence and duly found that the public convenience and necessity require the particular service sought to be authorized. * * * The 'opinion' and order do not state that the commissioners did, as indicated by the statute, consider 'the effect that the granting of such certificate may have upon other transportation facilities within the territory sought to be served by such applicant, and also the effect upon transportation as a whole within said territory.' * * *

While the statute does not contemplate that the business of transportation for compensation on the public highways shall supersede or vitally impair the business of existing transportation lines in the same territory, beyond that required for the public convenience and necessity, yet the public highway lines will necessarily compete for business to a greater or less extent with other lines. * * * The law does not give com-

mon carriers immunity from competition; but chapter 13700, Laws of Florida, does not authorize the business of common carriers who provide their own roads to be impaired by competition from carriers for hire who use the public roads of the state, further than the public convenience and necessity may require. * * * The order is not invalid on its face; and there is no 'clear and satisfactory' showing in the record and proceedings filed in response to the writ of certiorari, or otherwise, that the order is one that should not have been made in the premises. See *State ex rel. v. Florida East Coast R. Co.*, 69 Fla. 480, 68 So. 729, L. R. A. 1918F, 272. * * * Questions of policy not impairing organic rights in permitting and regulating competition between carriers using the public highways of the state and other carriers are for legislative determination. The courts may determine the legality of legislative regulations and of administrative action thereunder. As the order merely authorizes and requires the Georgia-Florida Motor Lines, Inc., to substitute buses for sedans on its established schedule line from its own terminal stations, and as the other certificate holder in the territory, the Florida Motor Lines, Inc., operates its buses on a different schedule line from its own terminal stations, the schedules and terminal stations of the two lines being different, the rights of the Florida Motor Lines, Inc., under the statute as a certificate holder in the territory are not clearly shown to be violated."

§ 807. Regulation of jitneys as common carriers.—The courts have held universally that the so-called jitneys or motor vehicles operating as common carriers may be classed by themselves and are a proper subject for public regulation and control and that where such service is unnecessary and would result in ruinous competition with the existing transportation systems it may be prohibited under proper legislative authority. That the power to regulate jitneys when duly conferred on municipal corporations may be exercised in the greatest detail in the supervision of their operation and in providing for the safety of their passengers and the public generally is well stated in the case of *Schoenfeld v. Seattle*, Washington, 265 Fed. 726, where the court said: "The identical issue here (in a practical sense) was before the state Supreme Court in *Allen v. Bellingham*, 95 Wash. 12, 163 Pac. 18, supra, and it was there held that an ordinance requiring 'jitney buses' to operate under a fixed schedule, over designated routes, regulating the places for stopping, the number of passengers carried, lights, inspection, and other matters,

can not be said to be inherently oppressive but it is within the power of the city in promoting the comfort and safety of the passengers, and that such ordinance is not invalid and unconstitutional because it provides penalties for the violation of its provisions, or because others in the same status may do lawfully what is prohibited to the 'jitney bus' owner. * * * No right was acquired by the plaintiff by reason of the establishment of routes, termini, and the operation of 'jitney buses' over such routes; nor did any privilege accrue by reason of the fact that he invested money in 'jitney buses'; nor is there force in the contention of the plaintiff that the issuance of a vehicle license for permission to operate a 'vehicle for hire' confers upon the plaintiff the right to operate such 'jitney bus' in violation of the ordinances of the city. A license is not property, nor is it a franchise."

§ 808. **Advent of jitneys and effect on transportation systems.**—The courts of Texas expressed the rule and defined the reason on which it was founded in the case of *Ex parte Sullivan*, 77 Tex. Cr. 72, 178 S. W. 537, P. U. R. 1915E, 441, as follows: "Thus matters stood until the advent of the 'jitneys,' which occurred in January, 1915. Their advent and operation created a state entirely different from what had existed theretofore. This necessitated, as the city deemed it, the passage of an ordinance to specially regulate them, which resulted in the passage of Ordinance 448 on February 15, 1915. * * * It is apparent that in the operation of the street cars and all other vehicles in Ft. Worth prior to the advent of the jitney their operation had never called for, nor required the city, in the protection of itself or its inhabitants, as a proper regulation of such carriers to require them, or any of them, to give any indemnity bond, as is now required of the jitneys. * * * So with the jitney, they select a certain route and termini. Their patrons, the public, adjust themselves to this, and depend upon them to run that route upon schedule time within reasonable hours. But the jitneys without necessity conclude that for a given day or for each day of a given week they will not run on that line at all, but run on another and a different one. The disappointment and inconvenience and trouble to the public that had adjusted itself otherwise would be an outrage to such an extent that such condition of things by the jitneys would not and should not be tolerated."

§ 809. **Regulation of jitneys doing business in streets and highways.**—To the same effect this court in the case of *Green v. San Antonio* (Tex. Civ. App.), 178 S. W. 6, defined the right of

local regulation of jitneys as follows: "The right to solicit passengers and convey them for hire from one part of the city to another, as appellant does, is a privilege, a right, or a power, which he can not exercise as of right, but its lawful existence must depend upon a grant whose character will not be changed by calling it a franchise, a privilege, or a license. The rights given could, with propriety be named a franchise. * * * The drivers of jitney cars have placed in their charge and keeping the lives of men, women, and children, and it would not only be unreasonable, but criminal, for the city to turn them loose on the streets unrestrained by any restrictions. Every owner of an automobile is required to obtain a license before he can use the streets and roads, and why should not the owner of a car who carries passengers for hire be required to obtain a license and be subject to inspection and regulation? If such vehicles are to be permitted on the streets, no valid reason can be given for not requiring them to serve the public to the best advantage, and as that will be attained by a regular route and regular schedule, they have been prescribed. It is contended that a city is not authorized to require a bond for the protection of citizens, and certain authorities are cited to sustain the contention, but they fail to do so. * * * The jitney service of the country is of such recent date that there are but few cases which have arisen in connection with its regulation, but regulation of such service is in no wise different from the regulation of any trade or business, or the running of stages or street cars on the streets, and decisions on those subjects are directly applicable to this new trade, occupation, or business of carrying people from one part of the city to another for five cents a person. * * * There can be no difference in granting a franchise to run cars on steel rails and to run them on the street surface. There can be no more reason for not exercising the same control over automobiles engaged in transporting passengers for pay than in supervising and controlling vehicles that can only move on metal rails. In fact there is greater inconvenience to traffic on the streets and more danger of accidents from numbers of automobiles dashing along at a high rate of speed in the hot quest for nickels than in the cars confined to certain well-defined tracks."

§ 810. Jitney and street car service compared and distinguished.—In distinguishing jitneys from street car service and permitting their separate classification for purposes of regulation, the court, in the case of *Huston v. Des Moines*, 176 Iowa 455, 156 N. W. 883, P. U. R. 1916D, 8, said: "In the first place,

'jitney' buses, as defined both in the statute and the ordinance, are common carriers doing an intrastate business upon the streets of defendant city, and, as such, are subject to such reasonable regulation and control as the proper governing bodies may determine, and this control involves the right to license or tax the same. * * * It is manifest that there is a great difference between 'jitney' and motor buses and street railways. The latter operate on fixed tracks, have regular routes and schedules, are operated under franchises which usually safeguard the right of the city and the public. They are compelled to pay taxes and for paving, have large investments, and their property is liable for judgments for personal injuries, which judgments are prior liens even to mortgages. See Code, section 2075. Not so with 'jitney' buses. Taxicabs do not operate over fixed routes or upon any schedule. They are more like the ordinary buses or carriages which make short occasional runs upon special orders, charge large fees, are not numerous, do not ordinarily compete with street cars, in that they are not confined to any special routes, are not required to make any particular routes, and are generally owned and operated by responsible companies. They differ essentially from street cars, and do not serve the general public as do 'jitneys'."

§ 811. **Jitneys defined and described.**—The right of local control and the power of the municipality to regulate jitneys, together with a definition of the term, is well expressed in the case of *Willis v. Fort Smith*, 121 Ark. 606, 182 S. W. 275, P. U. R. 1916D, 7, where the court said: "The state has the right to regulate and control the use of motor vehicles, except as it has granted such right to other governmental agencies, and it expressly recognizes in the Motor Vehicle Law the exclusive right of municipal corporations to make and enforce rules and regulations for motor vehicles for public hire. The definition of the term and use of the jitney as a conveyance brings such instrumentality within the operation of the provisions of said section 5454 of Kirby's Digest giving such corporations express power of regulation of every description of carriages which may be kept for hire. The municipal corporation therefore has all the power that belonged to the state for regulation of the operation of machines. * * * The jitney bus business, transporting people for hire, for a uniform five-cent fare, in low-priced or second-hand automobiles, over definite routes in cities or towns, is of but recent origin, but the regulation of the business followed hard upon its development by acts of the legislature in some

instances and by ordinances of the municipalities, in which they operated in others. * * * The contention that the requirement of the execution of a bond for the payment of judgments is a restriction the municipality was not authorized to impose, it creating, in effect, a civil liability, is without merit."

§ 812. **Jitneys classified.**—In upholding the special classification of jitneys as common carriers, the Oregon court in the case of *Thielke v. Albee*, 79 Ore. 48, 153 Pac. 793, P. U. R. 1916D, 7, 9, said: "We come then to the contention that the ordinance is void because railroad cars, street cars, and automobiles used exclusively as sight-seeing cars, hotel buses, and taxicabs are exempted from its operation. This question has been presented to the courts in several states, and in every case to which our attention has been called it has been held that the 'jitney' bus represents a new class of common carriers, and the fact that a different kind of regulation is applied to it does not render such legislation unlawfully discriminatory or invalid. * * * We think that it is quite clear that motor buses, as defined in the ordinance, are in a class entirely distinct from those excepted, and that therefore the classification is not unreasonable."

§ 813. **Jitneys defined and regulated as common carriers.**—The court of the state of Washington expressed the rule permitting the classification and definition of jitneys by themselves as common carriers in the case of *Allen v. Bellingham*, 95 Wash. 12, 163 Pac. 18, P. U. R. 1917E, 381, as follows: "Street cars are so far distinct as to be in a class by themselves, and any regulation applicable to a jitney bus could hardly be applicable to their situation. Auto stages operate on regular schedules between fixed points, usually between one city or town and another. Auto buses and horse carriages ordinarily carry passengers between given points, usually to and from depots, docks or other landings, and hotels. Sight-seeing automobiles are operated more in the nature of private conveyances than as public carriers, and their business bears no relation to the business of a jitney bus. Taxicabs, livery rigs, and the like operate from fixed stands and are put into use on hire. The jitney bus differs from each of these. It is operated continuously upon the streets, usually in the most congested parts, soliciting and taking up passengers wherever they can be found. It is never for hire at all; all that is offered is a seat and an opportunity to ride to some point within the limit of its operations. Its unrestricted use is fraught with danger, not only to the passengers it carries, but to others

using the streets for their own purposes. Being a common carrier, it is a subject of regulation, and we are constrained to believe that its business is such as to make it a subject of separate classification."

A limitation on the power of a municipality to regulate motor vehicles for hire, while operating on its streets, are cases where the vehicle is leased for a definite time on a fixed rental and for the personal use of the lessee. Under such conditions, the courts do not permit motor vehicles so operating to be regulated as though they were operating for hire, because they are used in the same way as though privately owned and operated for the personal use of the party in charge for the time being. This principle was established and discussed as follows in the case of *State v. Bee Hive Auto Service Co.*, 137 Wash. 372, 242 Pac. 384: "The corporation defendant and the individual defendant were charged by information with having violated the statute commonly known as the Jitney Bus Act. * * * The lessees took possession of the automobile and used it on the streets of the city of Seattle for a definite time and returned it to the lessor. While using it, they carried in it no one but themselves. The total charge for the service was \$1.65. The automobile was duly licensed by the corporation, and, while used by the lessees, had displayed upon it the license number issued to the corporation by the public authorities. The trial court reached the conclusion that the acts charged did not constitute a violation of the cited act either by the corporation or its manager, and entered a judgment dismissing the prosecution. * * * But we can not think the act of leasing has this result. It is true, of course, that the lessor, by the act of leasing, enters into certain obligations, so well understood as not to require enumeration here; but we think it manifest that he does not by the act undertake to carry anyone; and much less does he become by the act either a public or a private common carrier of passengers for hire. His situation is not different in legal effect from that of the old-time occupation of livery stable keeper, who keeps teams and carriages to let for hire. No court, in so far as we are aware, has ever held such a keeper to be a common carrier of passengers, and we think a like rule must apply to the defendants in this instance."

This principle denies the power of a municipality to tax leased motor vehicles while being used by the lessee personally and not for profit, although the occupants may be passengers, because they are not being carried for hire as that term is used in the

statute, for as the court said in the case of *Armstrong v. Denver Saunders System Co.*, 84 Colo. 138, 268 Pac. 976: "The complaint shows that plaintiffs keep automobiles for rent to persons who themselves drive them, and these are the cars which the defendant seeks to charge with this additional tax or license fee. The contract with every customer includes an agreement by him not to use the car 'as a private or public carrier of passengers for hire.' We think the plaintiffs' cars are not within the scope of the statute. The ordinary meaning of the word 'passenger' is a 'traveler by some established conveyance,' Webster. The plaintiffs' customers are bailees, not, in any ordinary use of the word, passengers; if they carry others in the rented cars, it is not for hire and they are not subject to the tax. It follows that it was the duty of the secretary to issue the license as prayed and the mandate was right. * * * The lessor of an automobile is not operating it any more than the lessor of a farm is cultivating it or the lessor of a horse is driving it. The whole statute thus becomes clear and consistent, and the result is that carriers of freight or passengers are taxed, but lessors of vehicles are not."

§ 814. Regulation of jitneys by safety bonds.—The necessity for the proper regulation of jitneys was promptly recognized by the court in the early case of *In re Cardinal*, 170 Cal. 519, 150 Pac. 348, L. R. A. 1915F, 850, as follows: "It is a matter of common knowledge on the part of those familiar with conditions in our large cities that the comparatively recent introduction of this class of vehicle, commonly known as the 'jitney,' for the carriage of passengers on the public streets, for a charge closely approximating that made on street cars, in view of the almost phenomenal growth of the institution, has made clearly apparent the necessity of some special regulations in order to reasonably provide for the comfort and safety of the public. * * * We can see no reason to doubt the power of the state, or any county or municipality, in the exercise of its police power of regulation, to require security in the shape of a bond or insurance policy from its licensees in all cases where the giving of such security may fairly be held to be a reasonable requirement for the protection of the public."

§ 815. License or privilege of jitneys to operate.—The court of Texas maintains the same classification of jitneys as before as shown by the decision of *Ex parte Polite*, 97 Tex. Cr. 320, 260 S. W. 1048, saying: "A municipal corporation, under its general powers, has the right to make the distinction between

those operators of automobiles who use the streets for ordinary purposes and those who use them in the pursuit of their occupation or business. * * * Nothing is discerned in the ordinance granting the use of the streets inconsistent with the right of travel or with the rights of abutting owners. It does not vest any exclusive privilege nor limit the power of the city over the control of the streets. In fact, it confers no privilege or immunity of a public nature to 'jitney service' men, but, as applied to them, is restrictive, in preventing them from conducting their business in the streets, a privilege which they might legally exercise, except for the intervention of the law-making power of the city. This court is impressed with the view that the right sanctioned by the ordinance is wanting in the essential elements of a franchise, but that it may be properly classified as a license or privilege."

§ 816. Classification of jitneys and requirement of bond.—The distinction which the courts make between jitneys and privately-owned automobiles, taxicabs and street railway systems for the purpose of classifying and regulating jitney service is clearly established legally and well founded in practice. The nature of the service and the manner in which it is performed clearly justify the distinction, and the courts have sustained the requirement for the giving of a bond as a condition for permitting such carriers to operate in the interest of the public served and for the protection of all the public, whether as passenger or pedestrian, against any personal or property damage sustained through the negligent operation of jitneys. This common carrier has been defined as a self-propelled motor vehicle operating between definite points or termini upon the public streets or highways, which carries passengers at a small fare similar to the service rendered by street car systems in that they accept and discharge passengers as required anywhere along the route. They move rapidly over congested streets and areas in search of passengers and are commonly operated by individuals who own or lease the car and have little or no financial responsibility as security for injuries inflicted or damages sustained through their negligent operation. The giving of a bond or liability insurance to cover such damages has been generally sustained by all jurisdictions, and the local authorities are permitted to determine when and under what conditions such service may be rendered. This rule and the distinction properly made between these different forms of local transportation for the public is well expressed in the case of *Memphis v. State*, 133 Tenn. 83,

179 S. W. 631, L. R. A. 1916B, 1151, Ann. Cas. 1917C, 1056, P. U. R. 1916A, 825, as follows: "The privately-owned vehicle ordinarily has but a single destination, at which it comes to rest. Its use is not urged to or towards the limit in order to the reaping of profits. We are unable to see merit in the distinction taken by the circuit judge, when he intimated the opinion that a classification of the jitney from privately-used automobiles might be sustained only so far as indemnity for damages done to passengers was concerned. Most of the dangers that surround such passengers in a substantial sense beset also the users of the street. Contrasting the jitney with street railway cars, to ascertain whether there be arbitrary classification: The street railway, by reason of its having tracks at definite places assigned it by municipal authority, on which tracks its traffic must move, is less liable to cause injury; and the substantial nature of its cars, and particularly the fixity, permanency, and great cost of its roadbed, afford an anchored indemnity in respect of its liability for negligence. Other marks for differentiation, appearing in the above outline of considerations imputable to the legislative mind, need not be reiterated. Assuming for test purposes (without meaning to decide or to intimate a decision) that taxicabs are common carriers, and that they are not included within the terms of the statute, does their exclusion operate to make the classification unreasonable and arbitrary? The word 'taxicab' is one of recent coinage, to describe a motor-driven conveyance that performs a service similar to the cab or hackney carriage, held for hire at designated places at a fare proportioned to the length of the trips of the several passengers, who are taken to be carried to destinations without regard to any route adopted or uniformly conformed to by the operator. The jitney holds itself out to accommodate persons who purpose traveling along a distinct route chosen by the operator. Operators of taxicabs have not the temptation or necessity, we may assume, of choosing the most traveled streets, since those less traveled afford them better opportunities to serve the object their owners have in view."

§ 817. **Traffic regulation of jitneys and bonds for security.**—A further definition of jitneys and of the nature of the privilege or license permitting their operation, as well as the necessity for the giving of a bond to secure any damage resulting from their negligent operation, is clearly provided in the case of *Public Service Comm. v. Booth*, 170 App. Div. 590, 156 N. Y. S. 140, P. U. R. 1916A, 955, as follows: "The contention is that the terms of

the act indicate that it has no application to buses already operating under city license, and that it does not interfere with the existing contracts or vested rights. But we have seen that there are no existing contracts or vested rights under such a license, and that its effect is merely to permit the business to be carried on. From the fact that between January 1 and May 22, 1915, 737 licenses for jitneys or similar buses were granted in the city of Rochester, we may infer that it is a traffic of sudden and rapid growth, and that somewhat similar conditions exist throughout the state. These jitneys operate upon any part of the street, and are not confined to a fixed track and, it is evident that, when they are seeking fares in competition with the street cars and other buses, some regulation is necessary to protect the passengers and the public from careless driving and improper operation. It is evident that the legislature, in passing the statute in question, had in view the protection of the public from the dangers incident to the traffic, and also the fact that these buses, carrying passengers for a small fare, come directly in competition with the street cars, which can only be operated under a certificate of convenience and necessity and the reasonable regulations of the public service commission. There is no difficulty in determining that the legislature, within the police power, had the right to make this law. If the enactment of the statute was necessary, it was also necessary that it should have force at once, and as to all buses of this class. The mere fact that a bus had received a license from the city before the enactment of the statute made it no less dangerous to the public than one which had no such license. There is no good reason why the statute should apply to the unlicensed bus any more than to one having a license. A law enacted for the safety and protection of the public should be so construed that the public may have the benefit of its full enforcement wherever its interests are threatened."

A statute requiring taxicabs operating in cities of the first class to furnish bonds or insurance of a substantial amount, conditioned for the payment of any judgment recovered from the negligent operation of such taxicabs, is sustained as a reasonable regulation and as payment for the use of the streets in the prosecution of a business for profit; and the fact that the cost of a bond or security may be prohibitive to a particular party, so long as it is reasonable and necessary in the public interest, is no excuse for its not being provided, as is indicated in the case of *Packard v. Banton*, 264 U. S. 140, 68 L. ed. 596, 44 Sup. Ct. 257,

where the court said: "This is a suit to enjoin the enforcement of a statute of New York (Laws 1922, chap. 612, p. 1566) alleged to be in contravention of the equal protection of the laws and due process clauses of the Fourteenth Amendment. The statute requires every person, etc., engaged in the business of carrying passengers for hire in any motor vehicle, except street cars and motor vehicles subject to the Public Service Commission Law, upon any public street in a city of the first class, to file with the state tax commission, either a personal bond with sureties, a corporate surety bond, or a policy of insurance in a solvent and responsible company in the sum of \$2,500, conditioned for the payment of any judgment recovered against such person, etc., for death or injury caused in the operation or (by) the defective construction of such motor vehicles. * * * But it is settled that 'a distinction obtains, and equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments, when the prevention of such prosecution is essential to the safeguarding of rights of property.' * * * We come, then, to the question whether the statute assailed contravenes the provisions of the Fourteenth Amendment. That the selection of cities of the first class for the application of the regulations, and the exclusion of all others, is not an unreasonable and arbitrary classification, does not admit of controversy. * * * If the state determines that the use of streets for private purposes in the usual and ordinary manner shall be preferred over their use by common carriers for hire, there is nothing in the Fourteenth Amendment to prevent. The streets belong to the public, and are primarily for the use of the public in the ordinary way. Their use for the purposes of gain is special and extraordinary, and generally, at least, may be prohibited or conditioned as the legislature deems proper. Neither is there substance in the complaint that street cars and omnibuses are not included in the requirements of the statute. The reason, appearing in the statute itself, for excluding them, is that they are regulated by the Public Service Commission Laws. * * * The allegation is that the rate of premium fixed by insurance companies operating in New York amounts to about eighteen dollars and fifty cents per week for each taxicab, while the net income from each is about thirty-five dollars per week. The operator, under the statute, however, is not confined to this method of security, but, instead, may file either a personal bond, with two approved sureties, or a corporate surety bond. Appellant says that he can not procure a personal bond, but it does not appear that he might

not procure the corporate surety bond at a less cost. Affidavits filed before on behalf of appellees tend to show that insurance policies in mutual casualty companies may be secured for \$540 a year; and that operators of upwards of a thousand cars have furnished personal bonds. The fact that, because of circumstances peculiar to him, appellant may be unable to comply with the requirement as to security without assuming a burden greater than that generally borne, or excessive in itself, does not militate against the constitutionality of the statute. Moreover, a distinction must be observed between the regulation of an activity which may be engaged in as a matter of right, and one carried on by government sufferance or permission. In the latter case the power to exclude altogether generally includes the lesser power to condition, and may justify a degree of regulation not admissible in the former."

§ 818. **Local control of jitneys obtains in Massachusetts.**—In Massachusetts the policy of local control obtains, each municipality exercising such regulation over matters of local transportation systems including jitneys as to them seems best suited to local conditions and demands. As a result there is little uniformity in these regulations and the practice of competition is often the rule because of the failure of the state itself to regulate the situation. In *Re East Taunton St. R. Co., P. U. R. 1923E, 791*, the situation was set forth as follows: "We have had occasion in other cases involving like rules and regulations adopted by licensing authorities of municipalities to consider the scope of our authority in the alteration, amendment or revocation of such rules and regulations. While under the provisions of the statute the department is given very broad authority, we are of the opinion that it was not the intention of the legislature that we should exercise such authority in the prevention or elimination of competition by motor vehicles with railroads or street railways. Many attempts have been made in the legislature to provide that motor vehicles should not be operated unless some state authority should determine that public necessity and convenience required their operation. So far as we are aware these suggestions have uniformly been rejected by the legislature. Both this commission and its predecessor, the public service commission, have frequently pointed out the undesirability of unwise competition by motor vehicles with railways. Notwithstanding whatever views we may have as to the wisdom of a municipality permitting motor vehicles to be operated in competition with existing street railways and thus depriving the

street railways of income so necessary to their proper maintenance and operation, we are of the opinion that we are not authorized to adopt rules directed to its prevention in opposition to the judgment of the local authorities, and feel that our determination should be largely confined to the questions relating to the safety of the traveling public and the passengers using the motor vehicles. We have no doubt that this includes a consideration of whether such vehicles can be operated safely on the streets upon which it is proposed that they shall be operated."

§ 819. **License to operate jitneys revocable.**—That a license to use the streets for the operation of motor vehicles for hire which had been issued under an ordinance making it revocable without notice is a mere privilege or permission, and that it may be revoked for cause or in the interest of the public welfare, and that after such revocation the operation of jitneys may be stopped to save the street railway system from being forced to suspend its operations because of financial difficulties due to such competitive conditions, was decided in the case of *Burgess v. Brockton*, 235 Mass. 95, 126 N. E. 456, the court saying: "Private property invested in the street railway has been in a sense devoted to a public use. It can not be withdrawn at the pleasure of the investors. * * * It can not be converted to other uses without great waste. Its owners can not be required in general to operate the road at a loss. * * * The petitioners have been licensed to transport passengers for hire. Their investment is not by its nature so irrevocably devoted to that service as is that of the street railway. It is obvious that the situation presents a conflict of interests, where the preponderating convenience of the public to be determined by some impartial tribunal ought to govern. That is the design of the ordinance."

§ 820. **Burden on petitioner to show necessity for service.**—A certificate of convenience and necessity permitting the installation of a motor vehicle service or any other will not issue unless such service is necessary or desired by the public at large, and the petitioner should be required to show that its service is demanded for the public convenience and necessity. In case the new proposed service is intended to supplant the present, the petitioner has the burden of proving that its proposed service would be continuous and sufficient to meet the public demand. This application of the principle under discussion is well expressed in the holding of the Illinois commission in *Re Kipp's Express & Van Co.*, P. U. R. 1923E, 249, as follows: "It has

been the policy of this commission not to issue a certificate of convenience and necessity to a new form of transportation in any field where there was a present transportation utility operating unless the present transportation facility either refused, failed, or was unable to render reasonably adequate transportation service in the field occupied. It is undoubtedly the duty of any transportation company when appearing as an intervener objecting to a new form of transportation from this commission to show either that it is fully occupying the field and furnishing adequate transportation service or that it will immediately adequately serve the public in the field it occupies. It is equally the duty of a petitioning transportation company as a part of its case to show its ability to furnish all of the transportation facilities necessary, and particularly where it seeks to replace a present transportation facility to show that if such facility is replaced by the new service the public necessity will be better served than at present. There is undoubtedly a field for motor transportation. The continued filing with this commission of petitions for certificates of convenience and necessity by motor transportation companies to enter into competition with railroad companies plainly shows this commission that the motor transportation service can no longer be ignored by steam railroad and electric interurban companies but that the economic question must now be answered whether railroads intend to fill the field served by their line with the most modern and most convenient service, adopting and coordinating motor transportation service in so far as it may assist in better serving the public within the field occupied by them, either by popularizing and extending express service or by their own efforts in their freight service, or whether they intend to meet motor transportation as a competitor. If the motor is used in conjunction with the steam railroad or interurban service, then perhaps a rate commensurate with the increased investment and bettered service would have to be allowed, but the length of haul by each form of transportation would be divided in the proportion that best suits the relative cost of each. On the other hand, should motor transportation be furnished by a competing company, the motor transportation will seek to maintain even longer hauls than they can economically serve and in the end the public would suffer. In either instance the public is entitled to the most convenient and modern service the progress of the art of transportation affords. On the other hand, this commission may well have a care that the public convenience and necessity shall not be the convenience and

necessity of a few and by installing motor transportation service curtail railroad transportation service enjoyed by much the greater bulk of patrons of the railroads and thus find that upon the installation of the motor transportation, while they have served the necessities of a comparatively few patrons of the motor car company, they have really curtailed the service of a vast majority which the motor service is entirely unable to serve."

While the burden of proof is on the petitioner to show that there is a public necessity for common carrier service by motor vehicles, where it appears that the motor-vehicle line proposes to render store-door pickup and delivery service at its own expense, the court sustained the action of the commission in its decision that such a service was a public convenience and necessity. In defining the word "necessity," the court indicated that while it did not mean indispensable, it should be made to include more than mere "convenience," and sustained the action of the commission, because it did not appear to be arbitrary or unreasonable. This decision and a discussion of the principles involved are found in the case of Yazoo & Mississippi Valley R. Co. v. Public Service Comm., 170 La. 441, 128 So. 39, P. U. R. 1930D, 312: "The Motor Freight Lines, Inc., renders a public service which the railroad company does not render or propose to render; that is what is called a store-door pickup and delivery of freight. The freight line sends its own vehicles to the places of business of the shippers, and, at its own expense, picks up and receipts for all shipments tendered for transportation to points between New Orleans and Baton Rouge, and brings the parcels to a central warehouse or depot, where they are classified, billed, and shipped in motor vehicles to their destination and delivered into the hands of the consignee. All so-called L. C. L. (less than carload) shipments by the railroad company must be delivered at the depot of the railroad company, by the shipper, at his own expense, and within hours specified by the railroad company, and, at the point of destination, the freight is delivered into the railroad company's depot, whence it must be drayed to the place of business of the consignee at his expense. It is admitted by counsel for the railroad company that this so-called 'store-door pickup and delivery' service, rendered by the Motor Freight Lines, Inc., is a matter of public convenience, but it is denied that it is a matter of necessity. It is well settled, in all jurisdictions where such a statute as the Act No. 292 of 1926 has been enacted, that the word 'necessity,' in the phrase 'public convenience

and necessity,' does not mean something indispensable. It is the meaning of the whole phrase 'public convenience and necessity' which the public service commission and the courts are concerned with, and which can be determined only according to the context, and not by dissecting the phrase and giving to each word, separately, the lexicographer's definition of it. If the legislature had intended that the word 'necessity,' as used in this statute, should mean something indispensable, the using of the word 'convenience,' or of the phrase 'convenience and necessity,' would have been inexcusable tautology, because the word 'necessity,' as used in the statute, includes and means something more than a mere 'convenience.' * * * There is, therefore, no abuse of authority on the part of the public service commission in its finding that the so-called store-door pickup and delivery service furnished by the Motor Freight Lines, Inc., which is something of an innovation in the method of handling local freight by public carriers, is a matter of 'public convenience and necessity,' within the meaning of the statute. Whenever the public service commission, in the issuing of an order, has acted within its power, and not arbitrarily or grossly contrary to the evidence, and when no error of law has been committed, the court must not substitute its judgment for that of the commission, or consider the expediency or wisdom of the order, or say whether on like evidence the court would have made a similar ruling."

§ 821. Statutory provisions requiring proof of necessity.—This principle is clearly recognized and expressly provided by the statutes of the state of Washington which provide that "the commission shall have power, after hearing, when the applicant requests a certificate to operate in a territory already served by a certificate holder under this act, only when the existing auto transportation company or companies, serving such territory will not provide the same to the satisfaction of the commission."

Exclusive privileges will not be implied, and the fact that a certificate of convenience and necessity has been issued to one party will not prevent the issuance of further certificates for additional service, although they should not be issued except in cases where the interest of the public requires additional service, as the interest of an individual concern desiring to render such service is not controlling, for as the court said in the case of *Black Bus Line v. Consolidated Coach Corp.*, 235 Ky. 559, 31 S. W. (2d) 917: "He is not entitled to such relief; he has overlooked the spirit of our statutes. They are to be construed in the interest of the traveling public, not the operator. So long

as Black meets the needs of the public convenience, the commissioner will protect his right to transport passengers between London and Corbin, and vice versa; but Black has not been given the exclusive right to use that portion of the highway and rights to transport passengers between any points north of London and any points south thereof, and between any points south of Corbin and any points north thereof may be granted to others, and they have been granted to the C. C. C. * * * The convenience of the public is the chief concern of the act, and it would be rather difficult to imagine a greater inconvenience to the traveling public than would result from the adoption of either of the plans suggested by Black."

A certificate for additional motor vehicle service should not be granted unless it would be a convenience and necessity, and the finding of the commissioner issuing such a certificate that it would be a convenience and might therefore be deemed a necessity is not a finding that there was a necessity for it, especially where the evidence fails to support such a finding. This principle is enunciated and discussed as follows in the case of *Shorty's Bus Line v. Gibbs Bus Line*, 237 Ky. 494, 35 S. W. (2d) 868, P. U. R. 1931C, 507: "The certificate granted to the Gibbs Bus Line to operate interstate motor vehicles for hire is valid as it affects the transportation of passengers from the state of Tennessee to any point in the state of Kentucky, or as it affects the transportation of passengers from any point on the route in Kentucky to any point outside of Kentucky. * * * The judgment of the circuit court confirming the action of the commissioner of motor transportation in granting the interstate certificate must be affirmed. As to the intrastate certificate, the question must be determined from the evidence. The commissioner before granting the certificate was not only required to find from the facts that it would be a convenience, but also that it was a necessity. * * * The commissioner found that the two additional schedules which he allowed by the certificate which he granted to the Gibbs Bus Line would be a convenience, but he did not say in so many words, or at all, that they were a necessity. His finding is to the effect that, because they would be a convenience, they may be, therefore, deemed a necessity. That was not a finding that they were a necessity. Neither do we conclude that the evidence justified a finding by the commissioner that the two additional schedules were a necessity."

§ 822. **Private and public use of streets and highways distinguished.**—One of the earliest and most comprehensive discus-

sions of the principles involved in the regulation of jitney bus service is to be found in the case of *Ex parte Dickey*, 76 W. Va. 576, 85 S. E. 781, L. R. A. 1915F, 840, P. U. R. 1915E, 93, as follows: "The right of a citizen to travel upon the highway and transport his property thereon, in the ordinary course of life and business, differs radically and obviously from that of one who makes the highway his place of business and uses it for private gain, in the running of a stage coach or omnibus. The former is the usual and ordinary right of a citizen, a common right, a right common to all, while the latter is special, unusual, and extraordinary. As to the former, the extent of legislative power is that of regulation; but, as to the latter, its power is broader, the right may be wholly denied, or it may be permitted to some and denied to others, because of its extraordinary nature. This distinction, elementary and fundamental in character, is recognized by all the authorities. * * * Power in the city to subject all kinds of wheeled carriages kept for hire to such regulations as the interest and convenience of the inhabitants thereof may require, in the opinion of the board of commissioners, and to refuse them license, is as broad as the power of the legislature itself over them. They, with the owners and keepers of hotels, are segregated from all other subjects of license and taxation, by the terms of the statute, and put into a separate and distinct class over which the city is accorded full and complete power. In all other cases, it is authorized merely to require licenses and impose taxes, and nothing is said about regulation. In these, there is an explicit grant of power to grant, refuse, or revoke licenses and to regulate in a manner and to an extent left in the discretion of the commissioners. * * * While this ordinance is said to be discriminatory in favor of omnibuses, taxicabs, hacks, and other vehicles kept for hire, not of the class described in the ordinance, and against that class, there is no suggestion, in the petition for the writ or in the argument, of the existence of 'jitney buses' in the city not included by the description. The price charged is made an element of the description, and, if there were 'jitney buses' charging more than fifteen cents, this might operate as a classification, with reference to the price charged for service and render the ordinance unreasonable. In the opinion of a majority of the members of this court, it would. But there is no pretense of the existence of such vehicles, and, if there are such, we have no judicial knowledge of them. The popular name of the vehicle signifies the contrary. A 'jitney bus,' charging more than five cents as the ordinary fare, would

be a contradiction in terms, and the ordinance may be amenable to criticism for misdescription, on that ground, but clearly not void for that reason. * * * These vehicles are more than mere automobiles incidentally used by the citizens for purposes of business and pleasure. They include an additional element, common carriage, bringing them within the municipal power of control, just as horse-drawn carriages and other vehicles fall within it, by reason of the peculiar uses of them. Our conclusion is that the ordinance is free from constitutional and other defects, and therefore valid. It may be burdensome and, in the opinion of many people, oppressive and unwise, just as many other valid laws are regarded. But the question submitted here is one of municipal power, not policy. With the latter the courts have nothing to do, nor can they overthrow laws, ordinances, or regulations made by competent authority, merely because, in the opinion of the judges, they might or should have been made more liberal or less rigorous."

Where the cost of delivery of goods is not reflected in their price, which is the same whether they are delivered or not, a tax can not be imposed on the motor vehicles of a concern in delivering such goods, but where there is a special charge added for the cost of delivering them so that the seller receives compensation for the delivery, a motor vehicle tax for the privilege of using the streets and highways of the state for transporting goods for compensation applies and the distinction between common and private carriers prevails and is recognized as proper in *Collins-Dietz-Morris Co. v. State Corporation Comm.*, 154 Okla. 121, 7 Pac. (2d) 123, where the court said: "In the first instance, the cost of the delivery service, having been charged to the general overhead expenses of the business, can no more be considered as a charge against the purchaser of goods than the cost of any other expense of operating the business. Had the intention of the legislature been to include such a transaction, there would have been no reason for the use of the language used in the act. The act was intended to apply only to those who transport for 'compensation,' and was not intended to embrace that class of transportation where goods are sold for a fixed price or conveyed merely as an incident to the sale, and where the price of the goods is not dependent upon whether or not they are delivered. * * * In the class under discussion now, the cost of the goods is the same whether they are delivered or whether they are not delivered. The cost of delivery is added to the overhead expenses and distributed over all the goods sold whether they

are delivered or not. * * * The transportation in the class under consideration can not be said to be for 'compensation,' and is only for convenience and the natural advantage incident to the delivery of goods sold. In our opinion, the act was intended to cover that class of transportation. * * * The cost of the delivery not only is reflected in the price of the goods delivered, but the price of goods delivered is greater than the price of goods sold by the same wholesale house that are not delivered. That the title to the goods remains in the vendor until delivered is immaterial. Since the seller receives compensation for the delivery of the merchandise, we must conclude that the legislative intent, as shown by the terms of the act, was that this delivery be included in the provisions of the act. * * * The state spends money for the construction of public highways. That money is derived largely from taxes. The state has the right to say what use shall be made of those highways and to prescribe reasonable restrictions on and conditions for their use. Where legislation imposes reasonable restrictions and conditions, it will not be disturbed by this court. We can not say that the imposition of a tax upon those who use the public highways for transportation of merchandise for 'compensation' is an unreasonable condition imposed on such use. * * * The transportation of livestock and farm products by the owners thereof in carriers owned by them is not generally on an 'intercity' basis, and the transportation of road material, as used in the act, is not generally on an 'intercity' basis. 'Road material,' as used in the act, refers to materials intended to be used for the construction, maintenance, and repair of public highways, and the language used does not apply to materials that could be used for the construction, maintenance, or repair of public highways but which, in fact, are intended to be used for other purposes. * * * The act makes a clear distinction between common carriers and private carriers and a separate scheme of regulation is provided for each."

As the highways belong to the state it may impose reasonable fees for their use by motor vehicles operating as common carriers thereon and in doing so, private carriers who make only an incidental use of the highways, and do not, of course, operate for hire as a business, may be exempt, as may also public carriers engaged in transporting school children, because this would simply add to the cost of the transportation and would have to be paid by the public which builds and maintains the roads. This principle is discussed as follows in the case of *Louis v. Boynton*, 53 Fed. (2d) 471: "The highways belong to the state. It may

make provisions appropriate for securing the safety and convenience of the public in the use of them. *Kane v. New Jersey*, 242 U. S. 160, 37 Sup. Ct. 30, 61 L. ed. 222. And it may impose fees with a view both to raising funds to defray the cost of supervision and maintenance, and to obtaining compensation for the use of the road facilities provided. *Buck v. Kuykendall*, 267 U. S. 307, 314, 315, 45 Sup. Ct. 324, 69 L. ed. 623, 38 A. L. R. 286; *Hendrick v. Maryland*, 235 U. S. 610, 35 Sup. Ct. 140, 59 L. ed. 385; *Clark v. Poor*, 274 U. S. 554, 47 Sup. Ct. 702, 71 L. ed. 1199. The act here was passed to provide revenue for the supervision and upkeep of the highways of the state. The power to tax is essential to the existence of the government of a state, and the equal protection clause does not compel a state, in the exercise of that power, to adopt an iron rule of equal taxation. * * * Private carriers make only an incidental use of the public highways and do not transport persons or property thereon for hire as a business. Because of this difference, we think all private motor carriers could properly be placed in a separate class and exempted from the tax. If this be true, there is no valid objection to an exemption of private motor carriers who operate only within a radius of twenty-five miles of the corporate limits of a city or village. The same is true of a person transporting his own livestock, farm products or supplies. * * * A tax on public carriers engaged in transporting school children would simply be added to the cost of transportation. This is paid for by the school districts, which are instrumentalities of the state. If the tax were collected it would only be taken from one department of the state government and paid by another. This, in our opinion, affords a just ground for exempting school bus transportation from the tax. * * * Attack is also leveled at certain provisions of Kansas Laws 1931, chapter 236, *supra*, which require the furnishing of certain reports, data, and information to the commission. This information is essential to the enforcement of the tax provisions of section 13 and in our judgment may be required of all carriers subject to such tax."

In distinguishing between the private and public use of streets and highways for the purpose of regulating motor vehicles operating thereon, a concern, using its own motor vehicles for the delivery of its own products, is private rather than public and accordingly is not liable for the payment of a tax on motor vehicles operating for hire, as is indicated in the case of *Kroger Grocery &c. Co. v. Cynthiana*, 240 Ky. 701, 42 S. W. (2d) 904, where the court said: "It is argued in support of ground 1: (a)

That the ordinance by its express terms attempts only to tax trucks that are operated upon or over the streets of Cynthiana 'for hire or compensation,' and that plaintiff does not so operate any of its trucks, but employs them solely in prosecuting its individual business; and (b) that by the express terms of that part of the ordinance attempting to embrace plaintiff's trucks the owners of them, before becoming amenable to the ordinance, must be engaged in a business 'in any other locality than the city of Cynthiana,' and that, since plaintiff operates stores in the prosecution of its business both in the corporate limits of Cynthiana and outside of it, the ordinary meaning of the quoted language is to exclude it and render it exempt from the exacted fees and tax imposed by the ordinance. It is our conclusion that both of those arguments are sound. * * * It will thus be seen that the term 'compensation' in law primarily applies to a transaction between two or more persons and does not enter into or arise from a unilateral transaction, purpose, or policy of one person alone in the prosecution of his individual enterprise or undertaking. * * * In other words, the language 'engaged in business in any other locality other than the city of Cynthiana' plainly excludes one who is engaged in business within the city, the one class embracing all of those whose business is conducted within the city, and the other embracing those conducting business exclusively outside of the city, and it was the latter class that was attempted to be reached by the attacked provisions of the ordinance."

In distinguishing between common and private carriers and carriers operating over city streets, private carriers and those using the municipal streets may be classified and excluded from the payment of a tax which may be levied against common carriers in their use of the streets and highways, for as the court said in the case of *Continental Baking Co. v. Woodring*, 55 Fed. (2d) 347: "A similar attack was made upon this statute by a 'contract carrier,' and the statute was held to be good as against that attack by this court, Judges Phillips, Symes, and Hopkins sitting. *Louis v. Boynton et al.*, 53 Fed. (2d) 471. We will adhere to the rulings of that court, as far as pertinent, not only because we agree with them, but for the more fundamental reason that courts of coordinate jurisdiction sitting in the same district must not attempt to overrule the decisions of each other, except for the most cogent reasons. * * * The state of Kansas has constructed at great expense a system of improved highways. These have been built in part by special benefit and in part by a tax

on gasoline sold in the state and by license fees exacted of all resident owners of automobiles. These public highways have become the roadbeds of great transportation companies, which are actively and seriously competing with railroads which provide their own roadbeds; they are being used by concerns such as the plaintiffs for the daily delivery of their products to every hamlet and village in the state. The highways are being pounded to pieces by these great trucks which, combining weight with speed, are making the problem of maintenance well-nigh insoluble. The legislature but voiced the sentiment of the entire state in deciding that those who daily use the highways for commercial purposes should pay an additional tax. Moreover, these powerful and speedy trucks are the menace of the highways. That those who use the highways, as the plaintiffs use the highways, are subject to regulation by the state to insure the safety of others on the highways admits of no dispute. It is likewise settled that such users, although nonresidents and although engaged exclusively in interstate commerce, may be required to contribute to their cost and upkeep. The highways are public property. The amount of the charges and the method of collection are for the state to determine, so long as they are reasonable and conform to some fair and practical standard. * * * Reading the statute as a whole, there is no difficulty in arriving at the conclusion that the legislature intended to confine its control of private carriers to matters of taxation and of public safety. The authorities * * * amply sustain the power of the state over all carriers in these two respects. * * * There can be no serious question as far as the exemption applies to those vehicles operating wholly within any city or village of the state. As to private carriers, this is primarily a taxing statute, and since city streets are neither constructed nor maintained by the state, there is no reason why the state should exact a charge for vehicles which do not use the state highways. * * * The legislature knew that as a matter of fact farm products are transported to town by the farmer, or by a nonexempt 'contract carrier' employed by him. The legislature knew that as a matter of fact the use of the highways for the transportation of farm products by the owner is casual and infrequent and incidental; farmers use the highways to transport their products to market ordinarily but a few times a year. The legislature rightly concluded that the use of the highways for carrying home his groceries in his own automobile is adequately compensated by the general tax imposed on all motor vehicles. * * * Of course, twenty-five

miles is further than five miles; and it does seem that a twenty-five-mile exemption, even for facility of administration, is pretty far. But, if the state has the power to create this penumbra about the city, the question of the distance must be left to the legislature, unless it is clearly arbitrary. * * * As far as private carriers are concerned at least, this power is limited to such regulations as will protect other travelers and shippers on the highways and protect the highways themselves. Under this power it can control, within reasonable limitations, the width, the length, the height, the weight, the speed, the lights, the brakes, on these large and speedy trucks which continually use the highways."

A statute requiring the securing of a certificate of convenience and necessity and the giving of a bond for the protection of the public against injuries and of the persons and property carried, and which makes no distinction between common and private carriers, goes beyond the power of the state and is not binding upon a private carrier operating under an exclusive contract, because this in effect constitutes a private carrier a public one by subjecting it to the same obligations. Although the state may require security for the use of its highways from both common and private carriers, it must classify and distinguish between the two in other matters, for as the court said in the case of *Smith v. Cahoon*, 283 U. S. 553, 75 L. ed. 264, 51 Sup. Ct. 582, P. U. R. 1931C, 448: "From the undisputed evidence upon the preliminary hearing, it appears that the appellant was employed under an exclusive contract with the Atlantic & Pacific Tea Company in hauling its merchandise from Jacksonville to various places in Florida. He has never held himself out as a common carrier. * * * The statute on its face makes no distinction between common carriers and a private carrier such as the appellant. It applies, without any stated exception, to every auto transportation company within the statutory definition, and this admittedly included the appellant. It not only required an application for a certificate of public convenience and necessity but that this should be accompanied by a schedule of tariffs, and no such certificate was to be valid without the giving of a bond by the applicant for the protection both of the public against injuries and of the persons or property carried. * * * All carriers within the act, whether public or private, are put by the terms of the statute upon precisely the same footing. All must obtain certificates of public convenience and necessity upon like application and conditions. It is true that the statute does not in express

terms demand that a private carrier shall constitute itself a common carrier, but the statute purports to subject all the carriers which are within the terms of its definition to the same obligations. Such a scheme of regulation of the business of a private carrier, such as the appellant, is manifestly beyond the power of the state. See *Michigan Public Utilities Commission v. Duke*, 266 U. S. 570, 576-578, 69 L. ed. 445, P. U. R. 1925C, 231, 45 Sup. Ct. 191, 36 A. L. R. 1105; *Frost v. California Railroad Commission*, 271 U. S. 583, 592, 70 L. ed. 1101, P. U. R. 1926D, 483, 46 Sup. Ct. 605, 47 A. L. R. 457. * * * But in establishing such a regulation, there does not appear to be the slightest justification for making a distinction between those who carry for hire farm products, or milk or butter, or fish or oysters, and those who carry for hire bread or sugar, or tea or coffee, or groceries in general, or other useful commodities. So far as the statute was designed to safeguard the public with respect to the use of the highways, we think that the discrimination it makes between the private carriers which are relieved of the necessity of obtaining certificates and giving security, and a carrier such as the appellant, was wholly arbitrary and constituted a violation of the appellant's constitutional right."

§ 823. **Priority in time of application for permit considered.**—While mere priority in time of application as between two motor vehicle systems should not determine to which system a certificate of convenience and necessity should issue, it is an element to be considered. Where an established system applies for a certificate to extend its service it is entitled to preference over a new system, especially where it has rendered adequate and satisfactory service and is responsible and equal to the demands of the proposed new service. As a matter of reasonableness such established system rendering proper service will be preferred over an entirely new system because it is rendering satisfactory service and in the course of building up a business has made substantial investments which should be conserved. As the court in the leading case of *Chicago Motor Bus Co. v. Chicago Stage Co.*, 287 Ill. 320, 122 N. E. 477, P. U. R. 1919D, 157, said: "If, in pursuance of the policy of the commission, it would not grant certificates to competing lines, it would undoubtedly, when the two corporations were asking a certificate for the same purpose, have authority to determine which corporation was capable of best serving the public. If both were equally capable and the status of both was the same, there would be no basis for a claim that the action of the commissioners in granting a certificate to

one of them was unreasonable. But it seems obvious to us that in view of the fact that appellant had been so long in the field, had spent large sums of money in securing the right to operate and in developing its business, as against the Chicago Stage Company, which had just come into existence and had spent no money in the enterprise, the former should in all justice be entitled to the preference unless the public interests would be best served by the latter company. Mere priority in time of application would not, of itself, govern the granting of the certificate, but is an element to be considered, in connection with all other elements and facts, in determining the reasonableness of the action of the commissioners. In other words, if it appeared that appellant had for months served the public efficiently and satisfactorily on the north side and that it was able to do so on the south side, to deny it a certificate and award it to the Chicago Stage Company would seem to be so arbitrary as to be unreasonable. * * * The Chicago Motor Bus Company was not shown to be a wealthy organization, but, so far as disclosed by the testimony, it had never been hampered for funds in developing and operating its bus lines and was not financially embarrassed. It had operated a large fleet of buses on the north side for several months, and no complaints had ever been made to the public utilities commission of inadequacy or inefficiency of the service rendered."

§ 824. **Municipal power to exclude from congested areas.**—By special charter the city of Toledo has control over its streets and other public places and the right to regulate motor vehicles operated thereon for hire. Under this authority the court held the city might exclude motor vehicles from operating in certain congested streets and areas, as decided in the case of *Powelsland v. Toledo*, 15 Ohio App. 198, the court saying: "The fact that the city of Toledo exists and functions under a special charter renders inapplicable many decisions of the Supreme Court defining the powers of municipalities and of city councils. By the adoption of the charter the inhabitants confer upon the city the power to license and regulate persons engaged in any lawful business, occupation, profession or trade, and to regulate and control the use, for whatever purposes, of the streets and other public places. The legislative power is vested in the council. * * * The ordinance, we think, does not delegate the power to license. It requires all persons operating motor buses of the character described in the ordinance to obtain a license. The ordinance does not appear to place any undue limit upon the licensing of motor buses. It provides in substance that one who desires to

operate a motor bus for hire shall file his application for a license with the department of finance and that this application shall contain a map of the proposed route, showing the streets, alleys and public places upon which it is desired to operate the motor bus, together with a schedule of time and number of cars and vehicles to be operated. The department of finance is then required to submit this application to the director of public safety for his consideration. If he approves the same, the department of finance is required to issue a license, upon the payment of the fee provided by the ordinance. The director of public safety in considering such application may exclude bus service from certain streets or parts of streets, not arbitrarily, but where safety, sanitary or other reasons involving the public welfare suggest or require such action upon the part of the director of public safety. In such event the ordinance gives the applicant the privilege 'of amending, modifying or altering his application so as to comply with the reasonable suggestions or requirements of the director of public safety, who shall have the power to approve the same in such amended, modified or altered form.' We think the ordinance is very far from conferring upon the director of public safety unlimited and arbitrary power. His action is to be determined in the first place by his duty to conserve the safety of the public and its general welfare, and the ordinance specifically implies that his suggestions or requirements as to modification of the application shall be reasonable. An appeal is provided for from the action of the department of finance in refusing to issue a license, or from an order or decision revoking any license which has been previously issued. The department of finance is the authority which issues or revokes the license. Its action in such respect is based largely upon the advice of the director of public safety, and we think that an appeal, as provided for, would reach almost any question that an aggrieved party might seek to have brought before the board of appeals. But, if not, the director of public safety is required to act in good faith, and in case of abuse of his powers, or of fraud, in the control of motor buses as given him under this ordinance, his action would be subject to review in the courts."

§ 825. **Congested areas defined and discussed.**—The question of what constitutes a congested area from which the city is given the power to exclude motor vehicle traffic is one of fact, and while the city authorities have a large discretion in the determination of this fact the ultimate question as to the reasonableness of the fact is one of law for the courts to determine on appeal. When

issued the license, permitting the operation of such transportation system, is not such a vested right as to prevent its revocation or modification. The court, therefore, will sustain the action of the municipal authorities in modifying the route fixed under a license to operate motor vehicles, thereby permitting their exclusion from certain streets in order to avoid congestion of traffic, as was indicated in the case of *Taylor v. Toledo*, 15 Ohio App. 475, where the court said: "If the plaintiff relied on the unreasonableness of the order made by the director of public safety, the burden rested upon him to establish the fact that it was unreasonable, which fact he utterly failed to establish. On the contrary, the evidence offered on behalf of the city proves beyond all question that the restricted area is highly congested and that the operation of the buses adds very materially to the congestion. It appears that some ninety motor buses, which operate for hire, are licensed by the city, and that on a week day more than seven hundred trips are made by these buses along Superior Street, in the excluded district, and more than five hundred trips made per day on Summit Street in that district, and the evidence shows that in the operation of these buses, when they stop to unload or load passengers, a long line of traffic is frequently obstructed and delayed; and it is apparent from the evidence that the incidents of traffic, including the loading and unloading of passengers, tend to bring these buses into this district in groups, so that when the front bus has completed its loading and unloading of passengers and proceeds on its route those buses in the rear are frequently not yet ready to proceed and they consequently still further delay and obstruct the traffic. The whole evidence leaves the impression on the court that there has been an increasing congestion of traffic and a materially greater difficulty in getting across the streets in that portion of the city. * * *

It appears from the language above quoted that the director of public safety has full power to establish routes and to exclude bus service from certain streets or parts of streets in the interest of the public welfare, that the regulation and control of buses operated for hire is imposed upon that official, and that the ordinance gives to the director of public safety the power to require licensees to comply with the rules and regulations respecting routes as they may be reasonably established from time to time by the director of public safety."

§ 826. **State versus local control.**—Under chapter 546 of the Laws of Wisconsin of 1915, the railroad commission of that state was given jurisdiction over street transportation by motor ve-

hicles operated for the use of the public for hire and rendering a service similar to that furnished by street railways. Under ordinance number 943, enacted by the city of Superior, June 6, 1922, a license was required to be issued by such city before operating any such motor vehicle system within the city. This license was conditioned on the giving of a bond for the maintenance of a fixed schedule of service together with the payment of certain fees, graduated upon the seating capacity of the vehicle, and the furnishing of an indemnifying policy of insurance against liability for damages due to their negligent operation payable in an amount up to \$5,000 to any one person and \$10,000 for any one accident. The ordinance further provided that such motor vehicles should not be operated upon certain streets of the city and that they should operate at frequent, stated intervals on others. In holding that the ordinance was void because it was in conflict with the state law, vesting in the railroad commission jurisdiction over this service, the court in the case of *Vanderwerker v. Superior*, 179 Wis. 638, 192 N. W. 60, P. U. R. 1923C, 236, held that: "By the adoption of the so-called *Jitney Law* (chapter 546 of Laws 1915, now sections 1797-62 to 1797-68), the legislature, through its administrative body, the railroad commission, assumed jurisdiction over the subject-matter of such service as that which is concededly being afforded by the plaintiffs—that is, street transportation by motor vehicles similar to that afforded by street railways. *Monroe v. Railroad Commission*, 170 Wis. 180, 174 N. W. 450, 9 A. L. R. 1007, note at p. 1011 [P. U. R. 1920A, 721]. All the questions as to what shall be the general routes and the territory, the character of the service and the hours of operation, all regardless of any other service being then furnished, are by such law vested in the determination by the railroad commission, subject to judicial review in the same manner as are its other orders, and such determinations are therefore beyond municipal interference or restriction. The situation presented is one where, if the plaintiffs, relying upon the certificate of the railroad commission, should undertake to operate in accordance with the same upon the streets therein designated, there would be an immediate conflict with the conditions of the ordinance. On the other hand, they could not operate at all in that capacity on the streets in Superior without the certificate of the railroad commission, ordinance or no ordinance, and yet, if they be required to comply with the conditions of the ordinance there is a substantial destruction as to plaintiffs of rights permitted to them by the state. To uphold the ordinance is to sub-

stantially nullify the certificate of the railroad commission. This can not and ought not be done. The legislative control, either directly or through its designated administrative body, is superior to any conflicting action of the legislative body of the municipality."

While the right to grant certificates of convenience and necessity for the purpose of regulating the service and fixing the rates, with the purpose always in view of preventing ruinous competition in the public interest, generally vests in the public service commission of the state, municipalities are generally given the right to regulate traffic in the exercise of their police power; and these regulations are sustained within reasonable limits, so long as they do not prohibit or unduly interfere with the regulations of the state. The question of the reasonableness of municipal ordinances regulating motor vehicle traffic is one of fact upon which evidence must be considered in deciding the matter, for as the court said in the case of *Stuck v. Beech Grove*, 201 Ind. 66, 163 N. E. 483: "The right to grant certificates of convenience and necessity, to regulate service, to fix rates, and to prevent ruinous and unrestricted competition are powers given to the public service commission to safeguard the public interest and promote public convenience and necessity, but cities and towns retain their right to regulate traffic and control their streets and exercise their police power generally by ordinances on subjects of municipal concern. Such regulatory ordinances are valid so long as they regulate within reasonable limits and do not prohibit or unreasonably impair or interfere with the right of operation of motor vehicle utilities which have received certificates of convenience and necessity from the public service commission.

* * * While courts are reluctant to declare ordinances invalid by reason of their unreasonableness, and the power to do so must be carefully exercised, when such unreasonableness is made clearly to appear the courts may declare them invalid. 43 C. J. 300, section 315. The trial court erred in not permitting appellants to introduce evidence on the issue of the reasonableness of the ordinances."

This same court in a later case indicated that municipalities, in regulating motor vehicles operating as common carriers on its streets, may prohibit the use of certain streets and make other reasonable traffic regulations which do not destroy or unreasonably interfere with the rights granted by the franchises or certificates of the state, for as the court said in the case of *Stuck v. Beech Grove* (Ind.), 163 N. E. 487, affirmed in 201 Ind. 78, 166

N. E. 153: "We have held, in the other case, that ordinances designating the streets within a municipality upon which buses may operate, or prohibiting their operation on certain streets, do not encroach upon the jurisdiction of the public service commission over motorbus common carriers, so long as the ordinances do not prevent or unreasonably interfere with the utility's operation under the certificate or franchise granted by that commission, and it follows that the trial court correctly sustained the demurrer to the complaint."

Under their statutory authority to grant franchises and regulate motor vehicle traffic operating for hire upon their streets, some municipalities are required to submit the franchise to a vote of their electorate after passing it in their council, and such provisions for further safe-guarding the granting of franchises are generally sustained, as is indicated in the case of *McCutcheon v. Wozencraft*, 116 Tex. 440, 294 S. W. 1105, where the court said: "The general statute does not authorize a proposed franchise to be submitted to a vote of the electorate of the city unless the council has, by a majority vote, granted such franchise, but limits the referendum to proposed franchises that have been granted by the council. This places with the governing authority—the city council—general control over the granting of rights or franchises to use the public streets for transporting passengers and freight for hire, and makes its rejection of a franchise absolute, and when one is granted by the council, gives the electorate, under certain regulations, the power to reject it. Thus the general law restricts the granting of a right or franchise to use or occupy the public streets of a city to the governing body of the city, and further safeguards the granting of such a franchise by providing a means of rejecting it by a vote of the electors of the city after it has been granted by the governing body."

This same court in another case indicated that municipalities may not require the payment of a substantial license fee by motor vehicles operating for hire on its streets, because this is prohibited by the statutory authority of the municipality, as the court said in *Waco v. Grimes* (Tex. Civ. App.), 288 S. W. 1113: "The ordinance in question provides other regulatory measures for the control and supervision of persons who operate service cars in the city of Waco, and provides a penalty for any one operating a service car without first paying the forty dollars and obtaining a license therefor. Under said ordinance, the driver of an automobile for hire, whether he is the owner or simply an employee, is required to pay the extra forty dollars. * * *

Article 6698 of the Revised Statutes expressly prohibits municipalities from levying any additional fee for the operation of motor vehicles to that levied by the state. * * * We concur with the holding expressed in said opinions, and same are determinative of the issues involved herein. The injunction in this case only restrained appellant from collecting the forty dollars license fee, and did not in any way prevent it from enforcing any other portion or provision of said ordinance."

Where the state commission has the discretion to determine whether it shall issue a certificate of convenience and necessity for the operation of motor vehicles as common carriers, the court will respect a fair and reasonable exercise of their discretion and sustain their decision, and whether they issue or refuse the certificate, the applicant can not insist upon its issue as a matter of right. This principle is established and discussed as follows in the case of *State v. Road Commission*, 105 W. Va. 90, 141 S. E. 524: "The purpose of this mandamus proceeding is to compel the state road commission to issue to relator, Wm. C. Chafin, a permit or certificate of convenience to operate taxicabs. * * * The commission in its motion to quash, and in its return to the alternative writ, denies that relator is entitled to permits or certificates of convenience as a matter of right. * * * Unquestionably, the legislature has the power to regulate the use of the public roads and the traffic thereon, for roads are so intimately woven into the life and affairs of civilized people that all persons, as well as almost every known article of barter and trade, are at some time found traveling or in transportation thereon. A person's right to travel on the roads or transport his goods can not be denied, but when using the roads in his private capacity he must obey 'the law of the road.' When he uses the public roads as a business for private gain, the power to permit, refuse, or regulate is more varied and extensive than when he uses them in the ordinary way. * * * Does the statute give any discretion to the commission to grant or refuse the issuance of a license to operate a taxicab? Can it take into consideration the public necessity or nonnecessity for such service? * * * Properly construed, our statute authorizes the commission to issue or refuse to issue a certificate of convenience to any applicant who proposes to operate his car for hire in the transportation of passengers or property, or both, whether the service be, or be not, rendered on regular routes or between fixed termini. * * * The statute clearly gives the commission power to grant or refuse a certificate of convenience to any applicant who applied to

conduct a business on the public roads. Discretion is given it in that regard; and it follows that relator does not have absolute right to the permit or certificate of convenience by making application accompanied by bond and license fees. Relator has not shown a clear legal right to the relief sought. Under the pleadings and proof we can not hold that the discretion of the commission has been arbitrarily or capriciously exercised, and the peremptory writ is denied."

§ 827. **Jitneys defined and distinguished in Indiana.**—In distinguishing jitneys from taxicabs and street railways, operating in streets, and in upholding a municipal ordinance for their special regulation, the Supreme Court of Indiana in the case of *Frick v. Gary*, 192 Ind. 76, 135 N. E. 346, said: "The difference between a street car operated on a railway track, under a franchise pursuant to which a large permanent investment has been made, and a Ford touring car used as a jitney bus, is obvious, and counsel for the appellant admit that they properly may be put in different classes. But it is urged that a taxicab may be and often is a Ford touring car, the same as appellant's 'jitney bus,' and that denying to appellant in the operation of his car the right to receive and discharge passengers on streets where taxicabs have that privilege is a discrimination which makes the ordinance unconstitutional. The word 'taxicab' has a well-known and definite meaning. Vehicles which operate from a fixed station at which the drivers receive passengers or receive telephone calls directing them where the passengers will be found, and which drive to the destination of their passengers over any streets which are available for such travel, should not be classified with vehicles which drive back and forth along one street on which the traffic is heaviest, picking up passengers from the sidewalks, and pushing through where the crowds are greatest as affording the best prospect for obtaining fares. The mere fact that the same kind of vehicle may be used in each business does not control the classification. If appellant will use his car as a taxicab, perhaps he may do so without violating the ordinance. It does not forbid the use of any particular kind of vehicle, but forbids making a certain kind of use of any vehicle whatever. The ordinance is not open to the objection that it arbitrarily classifies as different two things which are essentially the same. * * * A large number of 'jitney buses' driving rapidly along a much-traveled street, stopping wherever convenient to receive and discharge passengers, might seriously 'obstruct and encumber such street, so as to impede its free use for its proper purposes.' "

§ 828. **Jitney competition and rate regulation.**—The Indiana public service commission recognized the general rule of the necessity of considering motor vehicle competition in fixing reasonable rates for street railway systems and while as it says there is no statute vesting in the commission jurisdiction over jitney service, in the absence of regulation by the municipality, a street railway system operating in competition with unregulated jitney service is entitled to a higher fare because of that fact. In recognizing the necessity for the city of Indianapolis to regulate and control jitney service in the interest of the general public and for the purpose of avoiding an increase in street car fares this commission in *Re Indianapolis St. R. Co.*, P. U. R. 1921D, 210, said: "The evidence reveals that, on February 12th, there were approximately one hundred and thirty-one jitneys in competition with the local street railway. The matter of jitney competition is one for the city council to consider. It is a matter of grave concern to the mass of people in Indianapolis who have to rely on public means of conveyance. The estimate is that the jitneys take from the street railway companies approximately \$375 per day, which figured on a basis of 365 days a year would amount to \$137,000, or figured on the basis of 300 days would amount to \$112,500. The withdrawal of this amount of revenue from the street railway menaces the continuation of the basic five-cent fare. The evidence further is to the effect that jitney competition is increasing and it is likely to increase; that these competitors are under no requirement to give specific service; that their practice is to operate only during the profitable hours of traffic and to run ahead of the street cars and 'skim the short-haul business'; that they do not operate to the long distances that the street cars are operated; that in inclement weather or at late and early hours they are not to be relied upon. If the jitney is left unrestricted by the city and is permitted to thrive, it seems more than probable that they may take from the street car company sufficient revenue to make necessary continuance or increase of transfer charges, or abandoning them, to go to higher basic fares. In other words, the jitney, which serves the comparative few, menaces the low fare of the many. There is not vested in the commission authority over such carriers. If they are to be regulated or eliminated, the jurisdiction lies within the city's police powers."

§ 829. **Exclusive jitney service not desirable or sufficient.**—To the same effect was the reasoning and holding in the case of *Spokane v. Washington Water Power Co.*, P. U. R. 1921D, 762,

where the commission spoke as follows: "We trust that the mayor was not serious in his statement at the hearing to the effect that he would encourage unlimited jitney competition if the street car fares were increased. The department of public works of Washington has been given no power to regulate jitneys and could not deny or grant them the right to operate in the city of Spokane, nor could it regulate their rates or service if they did so operate. These powers are vested exclusively in the city commissioners and the mayor. We all know, if jitneys were permitted in the city, what it would mean, and it is unnecessary to discuss it here except as it may affect the ultimate transportation problem. If they are permitted to operate, they could perhaps drive the street car companies out of business and replace them, and that is something which should be seriously considered by all who are interested in this problem. We do not believe that a majority of the citizens of Spokane want jitney service to replace street car service. (The jitneys, under the most favorable conditions and under the strictest regulations, are not a suitable or satisfactory means of city transportation.) If jitneys are permitted to operate and so reduce the earnings of the street car companies to a point where they are, as one company in this case has been, actually operating at a loss, there is no power in this department or in the courts under the Constitution of the United States or the constitution and laws of this state whereby the companies can be compelled to continue to give service, for that would amount to a confiscation of their property. We are sure that the city of Spokane does not wish to be without a street car system."

§ 830. Effects of unregulated jitney service and competition.—A discussion of the general question of competition between established street car systems and unregulated jitneys, together with the statement of the opinion of the court as to the final outcome of such a condition, is to be found in the case of *Decker v. Wichita*, 109 Kans. 796, 202 Pac. 89, P. U. R. 1922B, 57, as follows: "It is argued that it stifles competition, but competition between utilities serving an urban community may be impractical and injurious to the public. If the maintenance of two systems of transportation where one is sufficient to accommodate the public makes the operation of both unprofitable, with the result that they could not provide proper equipment or furnish adequate service to the public, and both were heading towards bankruptcy, there would be good reasons for the city to select the one best able to furnish adequate service and give it an exclusive privi-

lege. In such cases regulation is deemed to serve a better purpose than competition."

§ 831. **Municipal power to license and regulate use of streets.**—That the municipalities of Iowa, as is true in most jurisdictions, may license and regulate the business of motor vehicle transportation upon its streets is the effect of the decision in the case of *Star Transp. Co. v. Mason City*, 195 Iowa 930, 192 N. W. 873, where the court said: "The city has power to license and regulate unless the legislature, by the motor vehicle acts, has repealed or withdrawn the power theretofore granted to cities and towns authorizing them to license and regulate business of this character. It may be conceded that in a number of instances some of the prior provisions are inconsistent with some of the provisions of the motor vehicle acts, and as to such, of course, the prior power granted is withdrawn. * * * That a person's making extraordinary use of the streets as here is a privilege, and not a matter of right, and that under such circumstances plaintiff has not the right to so use the streets without the consent of the city, see 4 *McQuillin, Municipal Corporations*, section 1620; *Dillon, Municipal Corporations* (5th ed.), 1210; *Pond, Public Utilities*, section 398 [section 494 of this edition]."

This same court in a later case reiterated its position, recognizing the right of municipalities in the exercise of their taxing power to exact a reasonable charge for the privilege of using its streets by motor vehicles, as is indicated in *Solberg v. Dav-enport*, 211 Iowa 612, 232 N. W. 477, where the court said: "It is the general rule that, where the charge for the license is imposed in the exercise of the police power, the amount which may be exacted may include and must be limited and measured by the necessary or probable expense of issuing the license and such inspection, regulation, and supervision as may be provided for in the act and may be lawful and necessary. * * * In the light of these rules of law and circumstances, can any other logical conclusion be reached than that this measure was never intended as a license measure in the true sense, but these various laws were passed and intended for one sole purpose, that was to raise money with which to build and improve and hard-surface the highways of the state. It was not intended in the narrow sense of an exercise of the police power for the purpose of regulating by licenses. * * * Therefore we shall assume, without deciding, that the charge provided in the statute arises from the exercise of the taxing power and not the police power. Having thus assumed, for the purposes of this case, that the fees charged

herein are 'taxes,' we then are face to face with the original proposition stated in the beginning of this opinion, to wit, Are these taxes within the meaning of article 7, section 7, of the Constitution? * * * Our conclusion is that, while the charges made herein are considered as a tax, they are not a property tax, and therefore do not violate article 7 of section 7 of the Constitution."

Municipalities may require the payment of an annual license fee of taxicabs operating over its streets for hire, even from non-residents, where the fee is reasonable, considering the class as a whole. This principle is established and discussed as follows in the case of *Fleming v. Wright*, 225 Ky. 129, 7 S. W. (2d) 832: "In 1918, the city of Fleming duly enacted an ordinance, No. 65, imposing an annual license of twelve dollars and fifty cents upon each of the taxicabs engaged in carrying passengers for hire in the town of Fleming. The appellee, Washey Wright, was engaged in that business, and was using two five-passenger Dodge machines. He maintained no schedule, no fixed routes, and was, in the true sense of the word, engaged in the taxicab business, ready to carry passengers any place they wanted to go. He lived in the city of Neon, and had paid a taxi license to that city under an ordinance requiring him to do so, but it appears that the most of his business originated at or near the depot in the city of Fleming where he solicited and received passengers and carried them to such places as they desired to go, either within the city of Fleming, the city of Neon, the city of McRoberts, or to points in the countryside. * * * 'Though a city can not require non-residents who merely pass through it in their automobiles, to pay a license fee, it can require a license of nonresidents who do an auto truck' or taxi 'business within the city, and can enforce the payment of such license by nonresidents' so engaged. See *Young & Jones v. Town of Campbellsville*, 199 Ky. 284, 250 S. W. 979; *Sistrunk & Co. v. City of Paris*, 205 Ky. 835, 266 S. W. 656. The reasonableness and validity of such an ordinance as this is measured not by its effect upon the individual assailing it, but by what would be its effect upon the whole class engaged in the same occupation. *City of Irvine v. Bergman*, 220 Ky. 804, 295 S. W. 1041. * * * This ordinance appears reasonable. The twelve dollars and fifty cents license is not excessive, and it is not inherently unjust. The city of Fleming has the right to exact a reasonable compensation for the use of its highways. See *North-ern Kentucky Transportation Company v. City of Belleville*, 215 Ky. 514, 285 S. W. 241."

A municipality may impose a tax upon motor vehicles operating for hire upon its streets, although part of its business is conducted beyond its limits, for as the court said in the case of California Fireproof Storage Co. v. Santa Monica, 206 Cal. 714, 275 Pac. 948: "Appellant rests its claims of illegality of said ordinance upon the grounds that it attempts to impose a tax upon persons, firms, and corporations doing business outside of said city of Santa Monica; that its effect is extraterritorial and an attempt to take private property without compensation for a public use; that it was enacted for taxation and revenue purposes in the guise of a police regulation; that it is oppressive, unreasonable, and arbitrarily discriminatory. We are of the view that said ordinance is not invalid on any of said grounds. * * *

From the very nature of the business in which appellant is engaged, if it is to enter said city ad libitum upon 'call,' as stated in the pleading, it will transact business therein precisely as it transacts business in the city of Los Angeles. It does not matter at which end of the line the business is initiated, its situs is the municipality of Santa Monica. The heavy auto trucks, moving machinery, and other appliances necessary to conduct said business are brought into said city, and its streets are made to sustain the burden of said business equally with the streets of the city of Los Angeles. That appellant's use of the streets of said city will not be occasional or merely incidental to a business conducted elsewhere, as in the case of *In re Smith*, 33 Cal. App. 161, 164 Pac. 618, and other cited cases, is apparent from the pleading, which discloses the purpose of appellant to use the streets of said city of Santa Monica for business purposes as frequently and as extensively as its business expectations may justify."

Municipal corporations may make reasonable regulation for the rate of speed of motor vehicles, so long as such regulations do not interfere with statutory provisions covering the same conditions and situations, as is indicated in the case of *St. Louis v. Von Hoffmann*, 312 Mo. 600, 280 S. W. 421, where the court said: "That the power to imprison for violation of an ordinance does not exist unless expressly granted must be conceded. 28 Cyc. 816. * * *

Then so far as the charter is concerned the power is expressly conferred upon the city to enforce its ordinances by means of imprisonment. * * *

From these statutes it is obvious that the charter provision in question is in complete harmony with the general law of the state. * * *

The ordinance of the city of St. Louis prescribing the maximum rates of speed at which motor vehicles under varying conditions may be driven

over its streets clearly falls within the category of municipal police regulations. And its character in that respect is in no wise changed by the fact that there is a general statute regulating the speed of such vehicles while moving along the highways of the state. *McInerney v. Denver*, 29 Pac. 516, 17 Colo. 302. A violation of the ordinance is therefore such an offense as may be summarily prosecuted, and this notwithstanding that a limited imprisonment may in the first instance be inflicted as a punishment therefor."

Where the municipality has the power to collect a license tax on all motor vehicles operating on its streets, whether for business or pleasure, a further tax may be imposed for the privilege of operating motor vehicles upon the streets as common carriers, for as the court said in the case of *Ex parte Andrews*, 324 Mo. 254, 23 S. W. (2d) 95: "The same statute authorizes municipalities to collect a license tax, one-third as much as the state exacts, from every owner of a motor vehicle who resides within the particular municipality and uses his vehicle within the municipality—for any purpose, whether for business or pleasure. It seems entirely clear that the privilege so authorized to be taxed is one in all respects like the one taxed by the state itself—the privilege of operating and driving motor vehicles upon the streets and thoroughfares of the municipality. The occupation tax referred to in the proviso is not a tax on the privilege of driving motor vehicles upon the streets of a city; it is a tax imposed on the privilege of conducting in a city the business of transporting passengers for hire in motor vehicles. It is not, therefore, included within the license tax, which the statute limits to one-third of that collected by the state. This disposes of the single question raised by the petitioner."

§ 832. **Power of regulation is not one of exclusion.**—That an ordinance purporting to regulate jitneys, which conferred an absolute arbitrary power on municipal authorities which they exercised to exclude jitney service for the purpose of perpetuating street railway service as a monopoly was void under the constitutional provision of Oklahoma, prohibiting the granting of an exclusive franchise, was the effect of the decision in the case of *Tulsa v. Thomas*, 89 Okla. 188, 214 Pac. 1070, P. U. R. 1923D, 653, the court saying: "From an examination of the record and the evidence of the commissioners for the city of Tulsa, we are thoroughly convinced that the ordinance in question was intended for the purpose of conferring upon the Tulsa street railway company an exclusive franchise to run buses over the terri-

tory and routes traversed by the plaintiffs. This was practically admitted by the city officials and was, in itself, an expression of an intention to violate the constitution of this state (article 18, section 7), which reads: 'No grant, extension, or renewal of any franchise or other use of the streets, alleys, or other public grounds or ways of any municipality, shall divest the state, or any of its subordinate subdivisions, of their control and regulation of such use and enjoyment. Nor shall the power to regulate the charges for public services be surrendered; and no exclusive franchise shall ever be granted.' Bunn's Ed., section 423. When any ordinance is passed with such an intent, it has been the consistent holding of the courts that it will not be upheld when attacked."

§ 833. Surety bonds exclusively not reasonable requirement. —A municipal ordinance requiring owners of jitneys as a condition of their operation to furnish a bond given by a surety company to the exclusion of solvent personal sureties or a cash deposit was found to be unreasonable and void in the case of *Jitney Bus Assn. v. Wilkes Barre*, 256 Pa. 462, 100 Atl. 954, P. U. R. 1917F, 903, where the court said: "In the present case the bond required is restricted to one furnished by a surety company, while the evidence shows that it is difficult to procure such a bond from a surety company. Under the circumstances, we think the exclusion of personal sureties is not justifiable or reasonable. The municipality is entitled to require good and sufficient security, but beyond that it should not go. The terms of the ordinance in this respect would forbid the deposit of cash, or a certified check, or municipal bonds, as security by the applicant for a permit, or the acceptance as sureties upon his bond of individual freeholders of unquestioned financial responsibility. We know of no other instance in which, where security is required by law to be given, an attempt has been made to confine such security to surety companies, to the exclusion of solvent and responsible personal sureties. * * * Regulation is not to be carried to the extent of prohibition."

The fact that a municipality requires a bond from motor vehicles operating as common carriers on its streets, which bond certain parties desiring to so operate are unable to furnish, is no reason for the invalidity of the ordinance, because the public interest is the paramount justification for the requirement and inordinate competition or inadequate ability or facilities of the would-be carrier is not controlling, for as the court said in the case of *Ex parte Schutte* (Tex. Cr.), 42 S. W. (2d) 252: "The

mere fact, if it be a fact, that the ordinance of a city fixes the amount of bond prerequisite to engaging in a public or quasi-public business at such sum as that named persons who have sought to engage therein could not pay the cost of a surety company bond for that amount, does not bring us to any fair conclusion that such bond is therefore necessarily excessive. Inordinate competition or inadequate facilities on the part of such persons, as well as many other considerations, might rightly affect their income without affecting the justice of the ordinance or the amount of the bond demanded. We do not think the ordinance in question on its face discriminatory, or that its effect would be to confiscate the property of any citizen. We see no need for discussing at any length the right of the city of San Antonio to require a bond from those who seek to engage within said city in the business of carrying passengers for hire. The purpose of the bond is manifestly the protection of the people in and of such city from harm and injuries resulting from the acts of those thus authorized by the city to use its domain and streets as a source of gain. The subject has been treated in many cases and settled adversely to relator."

§ 834. **Limitations on municipal regulation.**—The power vested in municipal corporations to regulate the use of their streets does not include the power to prohibit their use by motor vehicles operating as common carriers, for as the court in the case of *Dent v. Oregon City*, 106 Ore. 122, 211 Pac. 909, said of a motorbus line carrying passengers between Portland and Salem in that state over a regular route established upon the public highways: "At the time that plaintiff is alleged to have violated the ordinance of Oregon City, he had paid the license fees and otherwise complied with all the requirements imposed by the general laws of the state of Oregon upon a common carrier of passengers by motor bus or stage from one point to another in the state of Oregon. * * * Under those statutes every common carrier of persons and property who has paid the required license tax upon the motor vehicles employed by him and has regularly obtained a certificate from the public service commission permitting him to employ those vehicles as a common carrier is expressly authorized to operate the same upon the public highways, including streets within the boundaries of cities, for purposes of travel and passage, notwithstanding the prohibitions of any charter provision or ordinance of a municipality."

§ 835. **Municipal regulation under general-welfare clause of charter.**—Under the general-welfare clause of a municipal char-

ter, a city may not entirely deny motor vehicles the right to operate in their streets, for the power to regulate does not include the power to prohibit, as is well expressed in the case of *Quigg v. State*, 84 Fla. 164, 93 So. 139: "There is authority to license and to regulate the operation of such vehicles and all others when they are being used on the streets, and such authority contemplates full regulation in the interest of the public welfare; but prohibition of such use in toto is obviously not contemplated by the express authority to license, tax, control, and regulate. See *Malone v. Quincy*, 66 Fla. 52, 62 So. 992, Ann. Cas. 1916D, 208. Lawful regulation may partially prohibit by limiting and controlling the use; but it may not totally prohibit. Under the charter the city may regulate the use of jitney buses on the streets in any reasonable way that conserves the public welfare, and in so doing may circumscribe their privileges in the use of the streets; but no authority for the quoted ordinance entirely excluding jitney buses from the streets is shown."

Municipalities have the power to regulate the weight of loads carried by motor vehicles over its streets where the regulation is reasonable, as a means of protecting its streets, for as the court said in the case of *Ashland v. Ashland Supply Co.*, 225 Ky. 123, 7 S. W. (2d) 833: "Ordinarily the use of public highways is subject to reasonable regulations by the authorities charged by law with the care and maintenance of such highways, and it is only reasonable that the weight of loads to be hauled over the highways should be subject to the control of these authorities. * * * Section 3058-17, Kentucky Statutes, provides that the general council of a city of the second class shall have power by ordinance 'to forbid large and heavy loaded vehicles from passing along particular street or streets.' Without this provision, however, under the general authority conferred upon it to construct, maintain, and repair streets, the city would have authority to adopt reasonable regulations to protect its streets. *Home Laundry Co. v. City of Louisville*, 168 Ky. 499, 182 S. W. 645, *supra*; *People v. Wilson*, 62 Hun 618, 16 N. Y. S. 583. An ordinance which regulates the manner in which streets shall be used is valid, unless it is unreasonable and oppressive or is in conflict with state legislation upon the subject. As we view it, the ordinance in question is not unreasonable, and unless in conflict with chapter 113 of the Acts of 1926, is valid. This act measures the load that may be hauled in a vehicle on a public highway by the width of the tires of the vehicle, the weight permitted not to exceed 800 pounds per inch of width of solid rubber or rubber compounded

tires. The act does not fix a limit to the total weight, and this act is applicable to all public highways including city streets. Chapter 111 of the Acts of 1926 limits the load that may be carried by any vehicle with solid rubber or rubber compounded tires to 28,000 pounds, including the combined weight of load, vehicle, and driver. This act is not applicable to city streets. This would indicate that the legislature, in enacting the two acts in question, intended that the fixing of the maximum weight of vehicles using city streets should be left to the city. * * * The state makes no contribution to the construction or maintenance of city streets which have not been accepted as parts of state highways. The cost of maintenance and repairs must be borne by the city, and its right to adopt and enforce reasonable regulations for the protection of its streets from injury should not be taken away unless it clearly appears that the legislature so intended. A careful examination of the various acts of the legislature convinces us that it has not attempted in regulating the loads to be moved upon the public highways to cover the whole subject, but, in so far as streets are concerned, has left that matter open to the cities. * * * It does not appear that the regulations provided for in the ordinance in question are unreasonable or oppressive."

§ 836. Taxicabs defined and regulated.—Taxicabs are common carriers operating in the streets and highways for profit and may be regulated by the state or municipality in which they are doing business. In the absence of express statutory authority municipalities may regulate the operation of taxicabs and their use of the streets and highways under the general-welfare clause of their charter or by virtue of their authority under the police power. Taxicabs are motor vehicles operating within and between cities for hire and like all such vehicles they are subject to regulation and control in the interest of the public welfare and for the safety of the public, and because they enjoy a special privilege in the use of the public thoroughfare as a place of conducting a private business for profit they may be classified and required to procure a license, which may be issued only on the payment of reasonable fees and on compliance with other operating conditions, looking to the safety of the public as well as the passengers they may serve and for the common convenience and service of the public generally. In their service to the public taxicabs are subject to the most complete control of the city in which they operate in every respect. While they follow no fixed route or schedule of service the fares of taxicabs, their operating conditions in detail, and their places of business at depots, hotels,

and other public places may be designated and regulated for the public safety and convenience. In serving railways and other common carriers, hotels, and other public institutions locally, the principle is universally established that the owner or proprietor of such station, hotel, or other place of business may designate the particular taxicab company which shall use their premises and may indicate the place and manner of such use in their service to the public. Beyond the premises of such public places of business the city may regulate and indicate the place and plan for the operation of taxicabs in the interest of the public safety and to facilitate and improve the public service as well as to prevent congestion and to avoid all unnecessary annoyance to the traveling public.

Municipalities may provide by ordinance for the regulation of motor vehicles passing upon its streets, and in doing so, may fix a rate of speed beyond which traffic may be presumed to be reckless, and therefore prohibited, as is indicated in the case of *State v. Springville*, 220 Ala. 286, 125 So. 387, where the court said: "That the town of Springville, a municipal corporation having a population of less than two thousand inhabitants according to the federal census, had in effect from and after the twenty-seventh day of April, 1927, an ordinance of said town, being Ordinance No. 84, the fifth provision or section of which is as follows: 'No person shall operate a motor vehicle upon the streets, alleys or other driveways of the town of Springville, Alabama, recklessly or at a rate of speed greater than is reasonable and proper, having regard to the width, traffic and use of the street or driveway, or so as to endanger property or the lives or limb of any person. A rate of speed in excess of twenty miles on the straightaway when there is no intersection, or fifteen miles at intersections shall be presumed evidence of traveling at a rate of speed which is not careful and prudent and is hereby prohibited.' * * * The objection that the violation of the ordinance was not a misdemeanor is without merit. The acts of which the defendants were convicted were violative of the provisions of article 2 of said act, and did constitute a misdemeanor under the provisions of said act. Said act simply has reference to the violations of the act which are not felonies. It follows from the foregoing that said section 106 is valid and constitutional, and the trial court erred in rendering judgment for defendant on the agreed statement of facts."

§ 837. **Municipal regulation of taxicabs.**—In the early case of *Commonwealth v. Matthews*, 122 Mass. 60, decided in 1877, the

Supreme Judicial Court of Massachusetts sustained the authority of the municipality acting under a general statutory provision in prescribing the place at which carriages for the public service might stand and in regulating the general conditions of their operation in the public service. In expressing their unqualified opinion that the city possessed such power, the court said: "There is nothing, in the terms of that statute, that confines their powers to the making of rules as to the running of carriages in the streets; and it is manifest that the inconvenience occasioned by allowing them to stand at railroad stations, and other crowded places, might require equally minute regulations. The power to regulate is given in the most general terms, and we can not say that the manner in which it is exercised is unreasonable."

§ 838. **Railroad control of taxicabs.**—In sustaining the right of a railroad company to fix the place where taxicabs might stand in waiting for passengers and in determining what taxicabs shall have access thereto and in regulating their use of such stands generally, the court, in the early case of *Lucas v. Herbert*, 148 Ind. 64, 47 N. E. 146, 37 L. R. A. 376, decided in 1897, said: "It is settled that railroad companies have the right to make and enforce reasonable rules and regulations in regard to their stations and grounds—as to who shall enter upon the same, and how they shall conduct themselves while there. 19 Am. & Eng. Enc. Law, 820; 23 Am. & Eng. Enc. Law, 124, 126. This includes the right to make reasonable rules and regulations to prevent quarrels between the owners of competing omnibus lines and their employees while upon the depot grounds. For this purpose a railroad company may, if it admits omnibuses and hacks to the grounds, designate the stand each shall occupy, and thus prevent quarrels for place, and other scenes of disorder."

§ 839. **Municipal control of taxicab stands.**—This same court in the earlier case of *Veneman v. Jones*, 118 Ind. 41, 20 N. E. 644, 10 Am. St. 100, decided in 1889, in sustaining an ordinance authorizing the city to fix the stand or station for hacks and other vehicles at stations for the purpose of serving the public spoke as follows: "There can be no question but that the ordinance authorizing the depot marshal to prescribe the places where omnibuses, hacks, and other vehicles should stand at the railroad depot, and requiring drivers to obey the directions of police officers in regard to the places which their respective vehicles should occupy, was a proper regulation, and one which the

municipal authorities had the power to pass. * * * Such regulations tend to the convenience of the general public by protecting persons from the annoying solicitations of hackmen and others, who, when acting without restraint, often confuse travelers, besides engendering strife and contention among themselves."

Under the proper statutory authority, municipalities may regulate stands or stations for taxicabs and prohibit their parking or soliciting business at places other than such stands or stations, and the courts will uphold such a provision as a reasonable traffic regulation for the benefit and protection of the public, as is indicated in the case of *State v. York*, 90 Fla. 625, 106 So. 418: "The ordinance attacked provides, *inter alia*, that 'no taxicab, hack, bus or other vehicle will be permitted to have a stand within two blocks of Franklin street.' * * * While inartificially drawn, it clearly intends only to prevent the establishment of taxicab stands within the designated area, and the solicitation of business on the streets at places other than such regular stands as may be established outside such designated area. It is conceded that the city has all power necessary to regulate vehicles of all kinds on the streets of the city under section 1871 of the Revised General Statutes of 1920, and also under chapter 9925 of the Special Laws of 1923, and other acts conferring corporate powers. This ordinance does not prohibit the use of taxicabs on any of the city streets. The prohibition of taxicab stands, or the solicitation of business, on the streets within certain crowded areas, or areas of heavy and constant traffic, but allowing their free movement and use therein, is in the nature of a regulation, rather than a prohibition, of the use of such vehicles, and hence within the corporate powers of regulation."

§ 840. **Denial of right to solicit for taxicabs on trains.**—In denying the right of soliciting business or patronage on trains for the benefit of hotels and the like, the court, in the case of *Williams v. State*, 85 Ark. 464, 108 S. W. 838, 26 L. R. A. (N. S.) 482, 122 Am. St. 47, which was sustained by the Supreme Court in 217 U. S. 79, 45 L. ed. 673, 18 Ann. Cas. 865, said: "The legislature clearly has the power to make regulations for the convenience and comfort of travelers on railroads, and this appears to be a reasonable regulation for their benefit. It prevents annoyance from the importunities of drummers. It is suggested in argument that the statute was especially aimed at the protection of travelers to the city of Hot Springs. If this be so, we can readily see additional reason why the regulation is a wholesome one. A

large percentage of those travelers are persons from distant states who are mostly complete strangers here, and many are sick. Drummers who swarm through the trains soliciting for physicians, bath houses, hotels, etc., make existence a burden to those who are subjected to their repeated solicitations."

§ 841. Public safety and convenience considered in regulation.—That the city has the right to regulate the operation of taxicabs and to control the service they offer to the traveling public in the interest of the public safety and for the convenience of passengers is the effect of the decision in *Seattle v. Hurst*, 50 Wash. 424, 97 Pac. 454, 18 L. R. A. (N. S.) 169, where the court said: "The ordinance simply prohibits solicitors from soliciting business from passengers at certain times in railway stations, and nothing more. We can see nothing unreasonable in this. On the other hand, the regulation seems to us most reasonable, and cases may readily be imagined where such regulation might be necessary to protect passengers from annoyance and confusion even where the privilege of such solicitation was confined by contract to one company, like the one in this case."

§ 842. Solicitation of taxicab drivers regulated.—This same court in sustaining the power of the city to designate taxicab stands or stations at depots in the case of *Seattle Taxicab & Transfer Co. v. Seattle*, 86 Wash. 594, 150 Pac. 1134, said: "The ordinance does not by its terms affect the contracts of the railroad companies with other carriers. It does not undertake to do so. It simply provides that, when persons are engaged in the occupation of taxicab or other drivers, and 'while engaged in soliciting customers or passengers for hire,' they shall station themselves in certain places. It does not undertake to say that all persons shall be permitted upon the depot property or the wharves of carriers. It simply regulates the conduct of drivers while they are upon such property, and provides where they shall stand outside of such property when they are soliciting patronage. So it is apparent that there has been no attempt by this ordinance to regulate the conduct of transportation companies, such as railroads, steamboats, etc., but only to regulate the conduct of drivers of taxicabs within the city. We have no doubt that the city can make such regulations, and that is all it has attempted to do."

§ 843. Taxicabs distinguished from street cars and other motor vehicles.—In sustaining the distinction between street railways and taxicabs and other motor vehicles operating as com-

mon carriers and in upholding regulations including the requirement for the giving of a bond or surety against injuries or damages sustained through their negligent operation, this same court, in the case of *State v. Seattle Taxicab & Transfer Co.*, 90 Wash. 416, 156 Pac. 837, said: "It is not so with the other motor-propelled vehicles as we now know them. They require no fixed tracks which must be put in at the expense of the operator, as they run upon highways constructed and kept in order by the public. No considerable amount need be invested in visible or tangible property before operations are begun. Indeed, the vehicle itself may represent the entire capital of its operator, and this may be destroyed or rendered valueless in the very accident which would give rise to a liability. But without attempting to point out other differences, it is plain that the one from the necessities of the case must have a visible fund from which persons negligently injured by its operation may recoup his losses, while the other need not have such a fund, and this difference we think justifies legislation requiring a bond of indemnity from the one not required of the other."

Taxicabs may be distinguished from motor buses running on established routes and regular schedules, for taxicabs operate indiscriminately at all hours without fixed routes, receiving and discharging passengers as the service requires; because of this taximeters may be required of the one and not of the other, and their type may be determined by the municipal authorities for the sake of accuracy so long as their requirements are not unreasonable or arbitrary, for as the court said in the case of *Kentucky Cab Co. v. Louisville*, 230 Ky. 216, 18 S. W. (2d) 992: "Motor buses run and operated on established routes are excepted from the provisions of the ordinance, and it is argued that the ordinance is invalid because it unreasonably discriminates between taxicabs and motor buses. The classification by which motor buses run and operated on established routes are exempted from the provisions of the ordinance is reasonable and not arbitrary, *Reo Bus Lines Co. v. Southern Bus Line Co.*, 209 Ky. 40, 272 S. W. 18. There are valid reasons for such a classification. Motor buses are operated on established routes, have regular schedules, and take on and discharge passengers at regular stops. Taxicabs ply the business of transporting passengers indiscriminately, accepting and discharging them at any point, and operating at all hours of the day and night. * * * The general council may require the use of a taximeter which is accurate and reliable, and it will not be assumed that the board of public safety,

which is charged with the duty of determining the sufficiency of the type used, will act arbitrarily and unreasonably refuse to approve a type or design of taximeter that is sufficient for the purpose intended. Until the board does act arbitrarily and unreasonably an applicant for a license can not complain."

§ 844. **Municipal control of hackmen and taxicab drivers.**—In the early case of *Ottawa v. Bodley*, 67 Kans. 178, 72 Pac. 545, the Supreme Court of that state expressed this principle as to the power of the city to regulate and control this public service as follows: "A regulation of hackmen and others who solicit passengers at railway stations is in the interest of peace and good order, and obviously essential to the convenience and comfort of travelers. The placing of them under the direction and control of the city marshal is a reasonable and practical method of regulation. The power to designate the position for hackmen and solicitors of passengers must be placed in some one, and no reason is seen why it may not be properly given to the marshal, a peace officer, whose duty it is to preserve order throughout the city. We think there was power to regulate hackmen, and that it has been exercised in a reasonable and valid way."

§ 845. **Exclusive taxicab service for railroads.**—That a railroad company has the power to select and designate the agency for soliciting patronage or business upon its premises and to exclude others who would compete for such business is well expressed in the case of *Oregon Short Line R. Co. v. Davidson*, 33 Utah 370, 94 Pac. 10, 16 L. R. A. (N. S.) 777, 14 Ann. Cas. 489, as follows: "All these matters are subject to regulation by the state, and we know of no law, nor of any principle of justice, whereby one common carrier may, without compensation therefor, be compelled to provide space upon its premises for any common carrier to solicit patronage or business. * * * In this selection the carrier must necessarily discriminate in favor of one or more and against others. Is it not more in consonance with reason and common sense to permit the carrier to regulate the whole matter, subject to the control of the state in case the carrier abuses his privilege as a quasi-public servant? Can the law confer the right upon one person to carry on a part of his own business upon the property of another under the guise of regulating the business of transporting persons and property? This may, perhaps, be done in case the state imposes this condition in granting the charter or privilege under which the business is conducted. The courts, however, have no right to impose

such condition under the mere claim that it is sanctioned by the elastic term of public policy."

While a railroad may control the solicitation of taxicab business on its premises, it may not prevent taxicabs generally from delivering passengers in the public streets so long as they do not prevent others from exercising the same privilege by obstructing the street traffic. This principle is clearly stated and discussed as follows in the case of *Black & White Taxicab &c. Co. v. Brown & Yellow Taxicab &c. Co.*, 15 Fed. (2d) 509,¹⁴ where the court said: "Upon the subject of collusion generally the rule is well settled that where, as here, the proposed suit involves a substantial controversy, the fact that plaintiff and the railway company preferred that litigation be had in the federal courts, instead of in the courts of the state, is not wrongful. 'So long as no improper act was done by which the jurisdiction of the federal court attached, the motive for bringing the suit there is unimportant.' * * * The ultimately decisive question is merely whether the Tennessee incorporation is real or fictitious, having in mind that the incorporation is none the less real because of the motive which occasioned it. * * * It is the well-established rule in the courts of Kentucky that a railroad company can not grant the one person—a common carrier—to the exclusion of all other persons engaged in a like business, the right to come upon its depot grounds with his vehicles for the purpose of receiving freight and passengers. *McConnell v. Pedigo*, 92 Ky. 465, 18 S. W. 15; *Palmer Transfer Co. v. Anderson*, 131 Ky. 217, 115 S. W. 182, 19 L. R. A. (N. S.) 756, 133 Am. St. 237; *Commonwealth v. Louisville Transfer Co.*, 181 Ky. 305, 204 S. W. 92. In the courts of the United States, however, the rule is equally well settled that, when not unnecessary, unreasonable, or arbitrary, a railroad may make arrangements, including the granting of special privileges to a single concern, to supply passengers arriving at its terminals with hacks and cabs, and it is not bound, at least in the absence of valid state legislation requiring it to do so, to accord similar privileges to other persons, even though they be licensed hackmen. Such exclusive arrangement is not a monopoly in the odious sense of the word, nor does it involve an improper use by a railroad company of its property. *Donovan v. Pennsylvania Co.*, 199 U. S. 279, 295 et. seq., 26 Sup. Ct. 91, 50 L. ed. 192. * * * It follows that, in determining the validity of the contract here in question, we must follow the federal precedents, and

¹⁴ Affirmed in 276 U. S. 518, 72 L. ed. 681, 48 Sup. Ct. 404, 57 A. L. R. 426.

that, as respects the injunctive provision against appellant * * * the action below was correct. The railroad company has not appealed from the decree against it. This relief, including the provision against parking cars on the grounds of the railroad company, is directly within the decision of the Donovan case, *supra*. * * * The railroad company has no exclusive right to the control of the public streets, and appellant had the right, within reasonable limits, to use such public street, while existing as such, in properly prosecuting its calling, so long as such use does not obstruct others in legitimately using it upon equal terms. * * * And this is the only control the decree attempts. There is substantial evidence in the record that defendant had unreasonably obstructed ingress and egress in the respects enjoined."

§ 846. Railroads and hotels—Taxicab service.—The court in sustaining this principle held that it was equally applicable to hotels as well as railroad companies in *Kenyon Hotel Co. v. Oregon Short Line R. Co.*, 62 Utah 364, 220 Pac. 382, 33 A. L. R. 343, and in its decision said: "That a railroad company, in providing space for vehicles on its own grounds for those who may solicit trade or patronage, may prefer one transportation company as against all others, or one hotel company as against all others, is no longer an open question in this jurisdiction. * * * Here we have more than sixty plaintiffs, among whom are some hotel companies, all of whom claim the right to use every part of the streets adjoining the railroad depots with their vehicles, consisting of motor cars of all kinds, for the purpose of soliciting trade or for any purpose. In addition to appellant, all hack drivers, taxicab drivers, truck drivers, express men, sight-seeing vehicles, and all others would claim the rights and privileges. If, therefore, there were not some controlling or governing influence regulating the traffic and fixing the limits to the use of all kinds of vehicles in front of and near the entrances to the railroad depots, everyone passing to and from such depots would be in constant peril. * * * Moreover, in view of the use of all kinds of motor vehicles upon our streets at the present day, the necessity for the regulation of the traffic thereon is greater than it was when some of the cases hereinbefore cited were determined; and that is especially true at or near our depots and railway stations where there usually is much congestion on the arrival and departure of important trains. Indeed, there is not one good reason that can be urged why the regulation should not be even more stringent at some places than the ordinance here in question provides. * * *

If, therefore, a public utility abuses its right or privileges in dealing with the public or any of them, recourse for the redress of grievances should be had to the public utilities commission. This court can do no more than to inquire whether an ordinance or law is unreasonable, oppressive, or discriminatory, or is contrary to the provisions of some statute or the organic law of this state. Moreover, in case a public utility is guilty of unlawful discrimination, that question should be first submitted to the public utilities commission for investigation and determination."

§ 847. **Solicitation by taxicabs in depots denied.**—In sustaining an ordinance prohibiting the solicitation of patronage from passengers in railroad stations and other public places, the court in the case of *In re Barmone*, 174 Cal. 286, 163 Pac. 50, L. R. A. 1917D, 688, said: "In enacting this ordinance the city council may well have thought that active solicitation of patronage within depots would interfere unduly with the peaceable and convenient use of such depots by arriving and departing passengers. We can not say that such a view is unreasonable, or that the prohibition of such solicitation is not a proper means of promoting the comfort and convenience of the traveling public and protecting it from the annoyance of importunate requests for employment. This court has not heretofore had occasion to pass upon restrictions of this kind. Similar ordinances and statutes have, however, come under judicial review elsewhere, and the decided weight of authority, particularly that of recent date, supports the validity of such enactments."

§ 848. **Municipal regulation of taxicab stands in New York City.**—In sustaining the authority of the city of New York to regulate taxicabs and to provide the location of their stands in the streets and the length of time they may remain standing at such designated places, the court in the case of *Waldorf-Astoria Hotel Co. v. New York*, 212 N. Y. 97, 105 N. E. 803, held, however, that the city did not have the power to interfere with the right of access from its streets to private property abutting thereon. The fee in the streets of said city belongs to it, and after more than a century of regulation of its streets, the owner of property abutting thereon may not object to such use and regulation thereof as the city may see fit to impose. In sustaining an ordinance of the city authorizing the establishment of stations in the streets for public hacks or taxicabs adjoining railroads and steamship stations, hotels, theaters, and other public buildings this court said: "The establishment of a hack stand

under this ordinance as we construe it must have reference to preexisting conditions and the reasonable requirements of the abutting owners. In the case of a large hotel, for example, having several entrances in long-continued use, it would obviously be unreasonable to restrict the proprietors by blocking the others with a hack stand. So, also, the entrances to a hotel should be left ample enough, not only to permit guests and others to get in and out, but to permit a free approach to such entrances. The standard of what experience has proved to be convenient in the past, in order to afford free and ample ingress and egress to and from a hotel or other public building, furnishes a ready test of what constitutes a reasonable exercise of power under the ordinance; and upon such reasonable application of its provisions the abutting owners are entitled to insist. Otherwise, the ordinance must be deemed unlawful. * * * By the ordinance in question the mayor is authorized to locate public hack stands alongside the curb adjacent to public buildings, railroad stations, steamship and ferry landings, hotels, restaurants, and theaters. All these places possess a public character. They are frequented by large numbers of persons, many of whom are likely to use a public cab service if it is conveniently available. These considerations, it seems to us, amply warrant their inclusion in a common class so far as the purpose of this ordinance is concerned."

§ 849. **Contract of railroads with taxicabs exclusive.**—A case upholding the right of a railroad to contract for exclusive taxicab service from its station with a single company is that of *Thompsons Express & Storage Co. v. Mount*, 91 N. J. Eq. 497, 111 Atl. 173, 15 A. L. R. 351, P. U. R. 1921A, 205, where the court said: "We do not question the right of the Central Railroad Company to operate hacks and omnibuses in connection with its train service for the convenience of its passengers, and if it had undertaken to do so, perhaps a different question would now be presented. It has not done so, but has merely contracted that no one but the complainant shall have access to its station and platform for the purpose of conducting business which the railroad itself has not undertaken. The question we have to decide is not, as counsel urges, whether the railroad in the performance of a public duty can discriminate between the complainant and other hackmen, but whether the railroad company can give the complainant an exclusive right in a case where neither the complainant nor any of the defendants have any right whatever, or, in other words, whether the railroad may select its own company in a case where it is under no public duty to serve all who come,

and has express statutory authority to exclude all except travelers. Reason clearly answers in favor of the exclusion. The authorities * * * justify the exclusion on the ground that, even where the public duty exists, the right of the railroad company to make reasonable regulations involves the right to protect itself and its passengers from the turmoil and danger involved in a competition between hackmen on the platform of a railroad station and the consequent liability of the railroad company to respond in damages to a passenger in case of injury."

Railroads may exercise the right of ownership over their terminals and stations in designating what taxicab service may solicit and prosecute their business in their stations and on other property belonging to the railroads. This principle is generally recognized as the federal law which supersedes that of any other jurisdiction in conflict with it, as is clearly stated and discussed by the Supreme Court of the United States as follows in the case of *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U. S. 518, 72 L. ed. 681, 48 Sup. Ct. 404, where the court spoke in part as follows: "The opinion does not hold or suggest that the contract was contrary to any provision of the constitution or statutes of Kentucky or in violation of federal law. * * * And these decisions show that, without its consent, the property of a railroad company may not be used by taxicab men or others to solicit or carry on their business and that it is beyond the power of the state in the public interest to require the railroad company without compensation to allow its property so to be used. And state courts quite generally construe the common law as this court has applied it. * * * And, as the state is without power to require any part of the depot ground to be used as a public hack stand without providing just compensation therefor, then a fortiori such property may not be handed over for the use of petitioner without the consent of the owner. The decree below should be affirmed unless federal courts are bound by Kentucky decisions which are directly opposed to this court's determination of the principles of common law properly to be applied in such cases. Petitioner argues that the Kentucky decisions are persuasive and establish the invalidity of such contracts and that the circuit court of appeals erred in refusing to follow them. But, as we understand the brief, it does not contend that, by reason of the rule of decision declared by section 34 of the Judiciary Act of 1789 (now Rev. Stat. section 721, U. S. C. title 28, section 725), this court is required to adopt the Kentucky decisions. But, granting that

this point is before us, it can not be sustained. The contract gives respondent, subject to termination on short notice, license or privilege to solicit patronage and park its vehicles on railroad property at train time. There is no question concerning title to land. No provision of state statute or constitution and no ancient or fixed local usage is involved. For the discovery of common-law principles applicable in any case, investigation is not limited to the decisions of the courts of the state in which the controversy arises. State and federal courts go to the same sources for evidence of the existing applicable rule. The effort of both is to ascertain that rule. Kentucky has adopted the common law and her courts recognize that its principles are not local but are included in the body of law constituting the general jurisprudence prevailing wherever the common law is recognized. * * * The federal courts, while inclining to follow the decisions of the courts of the state in which the controversy arises, are free to exercise their own independent judgment. That this case depends on such a question is clearly shown by many decisions of this court. * * * The lower courts followed the well-established rule and rightly held the contract valid. The facts shown warrant the injunction granted."

§ 850. **Municipal regulation of taxicab stands at hotels and depots.**—That the city may fix and limit the place where taxicabs may solicit for business at hotels and depots is well expressed in the case of *City Cab, Carriage & Transfer Co. v. Hayden*, 73 Wash. 24, 131 Pac. 472, L. R. A. 1915F, 726, Ann. Cas. 1914D, 731, as follows: "Whether or not it is a reasonable regulation to require hackmen to keep themselves and their vehicles within an assigned space while soliciting for hotel patronage and passenger traffic at a depot on the incoming of a passenger train seems not to have been submitted to many courts, but those passing upon the question are unanimous in the conclusion that such regulations are, generally speaking, reasonable. * * * The solicitation is a purely private business pertaining solely to the private emolument of the solicitor or his employer, in which neither the traveler, the municipality, nor the general public has an interest. It would seem to follow that a regulation for the public interests, concededly reasonable in so far as public rights are concerned, should not be rendered unreasonable simply because it confers upon one person the advantage over another in the prosecution of a private business. We do not think it does so, and are constrained to hold that the regulations complained of are within the power of the city authorities."

§ 851. **Interest of public as basis of regulation.**—In the interest of the comfort and convenience, as well as for the safety of the public, it was expressly held that the city has the right to regulate taxicab service as a matter of principle, whether furnished by hackmen or motor vehicles, in the case of *Cosgrove v. Augusta*, 103 Ga. 835, 31 S. E. 445, 42 L. R. A. 711, 68 Am. St. 149, as follows: "If necessary, the municipality, by prescribing reasonable rules for the conduct of hackmen while plying their trade upon the premises of the railroad companies, could avoid the annoyance, etc., to which the public might otherwise be subjected. As we have already seen, the dominion of a railroad company over its depot grounds is no less complete and exclusive than that which any other owner has over his own property, and the corporation can admit or exclude whom it pleases, except when they may come to transact business with it as a common carrier."

§ 852. **Taxicabs as common carriers.**—That taxicabs are common carriers and subject to be regulated as such although such regulations may limit or restrain private rights is the effect of the early decision in *Lindsay v. Anniston*, 104 Ala. 257, 16 So. 545, 27 L. R. A. 436, 53 Am. St. 44, where the court said: "Hackmen, cartmen, and wagoners engaged in the carriage of goods or persons for hire, by the common law are regarded as common carriers, and the power lies in the legislature, in the absence of constitutional restraint or limitation to regulate, to prescribe the rule according to which their business may be conducted. * * * The power may be, and is often, delegated to municipal corporations, to be exercised for the promotion of the public convenience. When the power has been delegated in terms of the character employed in the amended charter, the validity of ordinances prescribing the times, places, and manner in which the employment is to be pursued has been uniformly sustained. * * * However this may be, the ordinance is a valid exercise of the power with which the municipal authorities were clothed; a power intended for the protection of the public and the promotion of good order, and its exercise deemed necessary for the public benefit. If thereby preexisting private rights are restrained or limited, the restraint or limitation is *damnum absque injuria*."

While taxicabs may be required to pay on their gross receipts for the privilege of operating, such a tax can not be levied on corporations operating taxicabs, while individuals and partnerships doing so are exempt from the payment of the tax, because this is an arbitrary classification and a violation of the federal Consti-

tution which safeguards all in the equal protection of the laws. Corporations, whether domestic or foreign, can not be specially taxed while individuals and others concerned in the same privilege are exempt. This principle is established and discussed as follows in the case of *Quaker City Cab Co. v. State of Pennsylvania*, 277 U. S. 389, 72 L. ed. 927, 48 Sup. Ct. 553, where the court said: "The tax is claimed under section 23 of an Act of June 1, 1889, P. L. 420, 431. * * * The gross receipts taxed were derived by plaintiff in error from the use of its motor vehicles for the transportation within Pennsylvania of persons and their luggage. Plaintiff in error contended that if applied to such receipts the section violates the equal protection clause of the Fourteenth Amendment. The highest court of the state upheld the act and affirmed the judgment. 287 Pa. 161, 134 Atl. 404. Plaintiff in error is a New Jersey corporation authorized to do business in Pennsylvania as a foreign corporation; and, since June 1, 1917, it has carried on a general taxicab business in Philadelphia. The Supreme Court held that the section taxes gross receipts from the operation of taxicabs. * * * Plaintiff in error was subject to competition in its business by individuals and partnerships operating taxicabs. The act does not apply to them, and no tax is imposed on their receipts. Corporations operating taxicabs are not exempted from any of the taxes imposed on natural persons carrying on that business. * * * The equal protection clause extends to foreign corporations within the jurisdiction of the state and safeguards to them protection of laws applied equally to all in the same situation. Plaintiff in error is entitled in Pennsylvania to the same protection of equal laws that natural persons within its jurisdiction have a right to demand under like circumstances. * * * The right to withhold from a foreign corporation permission to do local business therein does not enable the state to require such a corporation to surrender the protection of the federal Constitution. * * * Here the tax is one that can be laid upon receipts belonging to a natural person quite as conveniently as upon those of a corporation. It is not peculiarly applicable to corporations as are taxes on their capital stock or franchise. It is not taken in lieu of any other tax or used as a measure of one intended to fall elsewhere. It is laid upon and is to be considered and tested as a tax on gross receipts; it is specifically that and nothing else. In effect section 23 divides those operating taxicabs into two classes. The gross receipts of incorporated operators are taxed while those of natural persons and partnerships carrying on the same business are

not. The character of the owner is the sole fact on which the distinction and discrimination are made to depend. The tax is imposed merely because the owner is a corporation. The discrimination is not justified by any difference in the source of the receipts or in the situation or character of the property employed. It follows that the section fails to meet the requirement that a classification to be consistent with the equal protection clause must be based on a real and substantial difference having reasonable relation to the subject of the legislation. *Power Mfg. Co. v. Saunders*, *supra*. No decision of this court gives support to such a classification. In no view can it be held to have more than an arbitrary basis. As construed and applied by the state court in this case, the section violates the equal protection clause of the Fourteenth Amendment."

§ 853. **Privilege of operation subject to regulation.**—In more clearly defining the special privilege exercised in the operation of taxicabs and indicating the limitation which may be placed upon the preexisting right to use the streets for such purpose by the enactment of regulatory measures, the court in the case of *Rizzo v. Douglas*, 121 Misc. 446, 201 N. Y. S. 194, said: "The activity of city life, modern development of business, the necessity of rapid transit in cities to accomplish results, created a condition whereby certain persons by the operation of transit facilities could receive compensation from the traveling public. This first developed the use of cabs, afterwards horse-drawn street cars, later electric developments as a motive power for the cars, and still later the automobile. These were not in a sense a necessity, but were a mere convenience to facilitate business operations and the pleasures of the people. Those who sought to operate these adjuncts of our civilization were not acquiring a right. They had no right in the use of the streets for that purpose. They were petitioners to the seat of the government for the privilege of operating, and, being in that position, they must necessarily conform to the rules and regulations of that government before they can operate, and, under the conditions that are developing in this state on account of the irresponsible activities of these people they should be classed very particularly as being under the direct police power of the municipality."

§ 854. **Importance of motor development in local transportation.**—The far-reaching effect and importance of this method of local transportation, especially in connection with existing systems, is indicated in the case of *McCutcheon v. Wozencraft* (Tex.

Com. App.), 255 S. W. 716,¹⁵ where the court observed that: "The motor vehicle has been so rapidly and highly developed in the last twenty years that it constitutes one of the most important factors in our everyday life. In some localities the motor bus has supplanted in a large measure the street car, and it may be seriously questioned whether in the economic development of the future the latter may not eventually be discarded altogether or reduced to a much more restricted use. This is already true in some of the European cities, notably London."

§ 855. **Guest passengers.**—Because of the unusual dangers attending the operation of motor vehicles and of the amount of litigation attending injuries sustained by passengers who are guests in motor vehicles, a statutory provision releasing owners of such vehicles from responsibility for injuries to guests in cases of accidents, occasioned by ordinary negligence, is sustained as reasonable, and held not to be a violation of the federal Constitution providing for the equal protection of the laws, although gratuitous passengers in vehicles other than automobiles are not included in its provisions. This classification is sustained on the theory that motor vehicles in operation are peculiarly dangerous instrumentalities and may be classed by themselves for this reason, for as the court said in the case of *Silver v. Silver*, 280 U. S. 117, 74 L. ed. 221, 50 Sup. Ct. 57: "We need not, therefore, elaborate the rule that the constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object. * * * The use of the automobile as an instrument of transportation is peculiarly the subject of regulation. We can not assume that there are no evils to be corrected or permissible social objects to be gained by the present statute. We are not unaware of the increasing frequency of litigation in which passengers carried gratuitously in automobiles, often casual guests or licensees, have sought the recovery of large sums for injuries alleged to have been due to negligent operation. In some jurisdictions it has been judicially determined that a lower standard of care should be exacted where the carriage in any type of vehicle is gratuitous. * * * Whether there has been a serious increase in the evils of vexatious litigation in this class of cases, where the carriage is by automobile, is for legislative determination and, if found, may well be the basis of legislative action further restricting the liability. Its wisdom is not the concern of courts. It is

¹⁵ Affirmed in 116 Tex. 440, 294 S. W. 1105.

said that the vice in the statute is not that it distinguishes between passengers who pay and those who do not, but between gratuitous passengers in automobiles and those in other classes of vehicles. But it is not so evident that no grounds exist for the distinction that we can say *a priori* that the classification is one forbidden as without basis, and arbitrary. See *Ohio ex rel. Clarke v. Deckebach*, 274 U. S. 392, 397, 71 L. ed. 1115, 1120, 47 Sup. Ct. 630. Granted that the liability to be imposed upon those who operate any kind of vehicle for the benefit of a mere guest or licensee is an appropriate subject of legislative restriction, there is no constitutional requirement that a regulation, in other respects permissible, must reach every class to which it might be applied—that the legislature must be held rigidly to the choice of regulating all or none. * * * In this day of almost universal highway transportation by motor car, we can not say that abuses originating in the multiplicity of suits growing out of the gratuitous carriage of passengers in automobiles do not present so conspicuous an example of what the legislature may regard as an evil, as to justify legislation aimed at it, even though some abuses may not be hit.”

§ 856. **Consent to service.**—A chauffeur who ordinarily is the hired operator of an automobile does not include a salesman who operates his principal's car in performing the duties of his employment, and the owner of such an automobile is not liable for the negligence of his employee in operating it in a foreign state under a statute providing for the serving of notice on the owner's chauffeur, for as the court said in *Day v. Bush*, 18 La. App. 682, 139 So. 42: “To hold that the district court of Caddo parish has jurisdiction to hear and determine the merits of this suit against Bush is to hold that every nonresident who has an agent, employee, or other person engaged to him by employment in this state, who travels in the employer's automobile on the public highways in the pursuit of his business, may be impleaded in the courts of the state and forced to appear therein, in any suit growing out of a collision involving said car while operated by said agent or employee. We do not believe the legislature intended to reach such a case in adopting said act. It does not necessarily follow that because an agent or employee of one person has to operate an automobile to discharge his duties that by so doing he becomes the principal's chauffeur. The word ‘chauffeur,’ as employed in this act, means the hired operator of the nonresident's automobile, and can not be extended to include a salesman who operates the principal's car while performing the

duties of his employment. * * * Of course, it is well known the legislature had in mind, in adopting this definition, that class of operators who drive jitneys in the cities and towns for hire, and did not have in view the other class of chauffeurs who drive the cars of private persons for a salary or other compensation, and it was to this latter class of chauffeurs that Act No. 86 of 1928 relates. Statutes of this kind are in derogation of common right and must be strictly construed. They can not be extended by implication so as to include persons not coming within their terms."

The owner of a motor vehicle is not liable for its operation by another under a statute providing that a nonresident operating an automobile may be served by notice upon the chairman of the highway commission of the state where the automobile was being operated, unless the owner himself operates the car, for as the court said in the case of *Morrow v. Asher*, 55 Fed. (2d) 365: "The rapidity with which the motor-driven vehicle passes from state to state, and from point to point, and the extreme hardship of requiring the damaged citizen within such territory to follow the operator into other jurisdictions, is sufficient ground for the new method of service approved in that case. * * * To require the defendant here to answer for the act of McNey, there must be a finding that McNey was the agent. Concededly Asher was not operating the car in the sense that he was actually driving it. Differ as we may about the scope of the word 'operate,' there is highly respectable authority, both in dictionary and in court decisions, to the effect, as already shown, that operation means the actual handling of the machinery. If Asher was not operating in that sense upon the Texas highway, he could not be served by a notice upon the chairman of the highway commission."

A nonresident may be required to consent to the appointment of a state official as agent on whom the state may serve process for any legal proceedings growing out of his use of the highways of the state, as a condition precedent to his using them. When such notice is served on the agent, however, it must be given the nonresident, together with a copy of the process. This requirement is sustained as a reasonable regulation for the use of the highways by nonresidents and as a protection to the residents of the state or anyone injured by the negligent use of such highways or operation of motor vehicles thereon. This principle is established and discussed as follows in the case of *Hess v. Pawloski*, 274 U. S. 352, 71 L. ed. 1091, 47 Sup. Ct. 632, where the court said: "Motor vehicles are dangerous machines; and, even

when skilfully and carefully operated, their use is attended by serious dangers to persons and property. In the public interest the state may make and enforce regulations reasonably calculated to promote care on the part of all, residents and nonresidents alike, who use its highways. The measure in question operates to require a nonresident to answer for his conduct in the state where arise causes of action alleged against him, as well as to provide for a claimant a convenient method by which he may sue to enforce his rights. Under the statute the implied consent is limited to proceedings growing out of accidents or collisions on a highway in which the nonresident may be involved. It is required that he shall actually receive and receipt for notice of the service and a copy of the process. And it contemplates such continuances as may be found necessary to give reasonable time and opportunity for defense. It makes no hostile discrimination against nonresidents, but tends to put them on the same footing as residents. Literal and precise equality in respect of this matter is not attainable; it is not required. *Canadian Northern R. Co. v. Eggen*, 252 U. S. 553, 561, 562, 64 L. ed. 713, 716, 40 Sup. Ct. 402. The state's power to regulate the use of its highways extends to their use by nonresidents as well as by residents. *Hendrick v. Maryland*, 235 U. S. 610, 622, 59 L. ed. 385, 390, 35 Sup. Ct. 140. And, in advance of the operation of a motor vehicle on its highway by a nonresident, the state may require him to appoint one of its officials as his agent on whom process may be served in proceedings growing out of such use. *Kane v. New Jersey*, 242 U. S. 160, 167, 61 L. ed. 222, 226, 37 Sup. Ct. 30. That case recognizes power of the state to exclude a nonresident until the formal appointment is made. And, having the power so to exclude, the state may declare that the use of the highway by the nonresident is the equivalent of the appointment of the registrar as agent on whom process may be served."

This same court in a later case indicated that such notice and service of process on the secretary of state, who is not required to communicate the notice to the nonresident through the mail, is insufficient, and constitutes an unreasonable regulation for the use of the highways of the state by a nonresident. In his opinion, holding such a requirement to be unreasonable and void, Chief Justice Taft set forth the rule as follows in the case of *Wuchter v. Pizzutti*, 276 U. S. 13, 72 L. ed. 446, 48 Sup. Ct. 259: "This case involves the validity, under the Fourteenth Amendment, of a statute of New Jersey providing for service of process on nonresidents of the state in suits for injury by the negli-

gent operation of automobiles on its highways. * * * By the general state motor law, as amended by chapter 211, Laws of 1924, provision is made for the registration and license of automobiles owned by nonresidents who use the highways of the state (Pamph. Laws 1924, section 9, par. 4, p. 451). They are required to agree that original process against the owner made by leaving it in the office of the secretary of state shall have the same effect as if served on the owner within the state. * * *

We have also recognized it to be a valid exercise of power by a state, because of its right to regulate the use of its highways by nonresidents, to declare, without exacting a license, that the use of the highway by the nonresident may by statute be treated as the equivalent of the appointment by him of a state official as agent on whom process in such a case may be served. *Hess v. Pawloski*, 274 U. S. 352, 71 L. ed. 1091, 47 Sup. Ct. 632. The question made in the present case is whether a statute, making the secretary of state the person to receive the process, must, in order to be valid, contain a provision making it reasonably probable that notice of the service on the secretary will be communicated to the nonresident defendant who is sued. Section 232 of the Laws of 1924 makes no such requirement and we have not been shown any provision in any applicable law of the state of New Jersey requiring such communication. We think that a law with the effect of this one should make a reasonable provision for such probable communication. We quite agree, and, indeed, have so held in the *Pawloski* case, that the act of a nonresident in using the highways of another state may be properly declared to be an agreement to accept service of summons in a suit growing out of the use of the highway by the owner of the automobile, but the enforced acceptance of the service of process on a state officer by the defendant would not be fair or due process unless such officer or the plaintiff is required to mail the notice to the defendant, or to advise him, by some written communication, so as to make it reasonably probable that he will receive actual notice. * * * The Massachusetts statute considered in *Hess v. Pawloski* really made necessary actual personal service to be evidenced by the written admission of the defendant. * * * Every statute of this kind, therefore, should require the plaintiff bringing the suit to show in the summons to be served the postoffice address or residence of the defendant being sued, and should impose either on the plaintiff himself or upon the official receiving service or some other, the duty of communication by mail or otherwise with the defendant."

A statute providing for the service of notice in any county within the state on the owner of a motor vehicle in a claim for damages resulting from its negligent operation is sustained as reasonable and not in violation of the provisions of the constitution of the state in the case of *Schwarting v. Ogram* (Nebr.), 242 N. W. 273, where the court said: "An act, providing for service in an action against an automobile owner in a county other than that where the injury sued for occurred, was held not invalid as a local or special law, in violation of section 7, article 3 of the Constitution of Pennsylvania. *Garrett v. Turner*, 235 Pa. 383, 84 Atl. 354. * * * The members of the legislature having determined that a particular law was necessary for the public good, and this question being one particularly within their power and jurisdiction, their action should not be interfered with by the courts unless their power has been improperly or oppressively exercised. * * * This court finds that it was within the power of the legislature to enact said provision, and if any injustice appears therein, it must be corrected by the lawmaking power, and not by the courts."

Service of notice on the nonresident owner of a motor vehicle in a claim for damages resulting from its negligent operation may be made upon the secretary of state under proper statutory authority, as is indicated in the case of *Allen v. Campbell* (La.), 141 So. 827, where the court said: "Defendants are nonresidents of the state of Louisiana. They are sought to be cited under Act No. 86 of the Legislature of Louisiana for the year 1928. Section 1 of that act provides, in effect, that when a nonresident accepts the rights and privileges conferred by existing laws to operate a motor vehicle on the public highways of Louisiana, or the operation by a nonresident, or his authorized chauffeur, of a motor vehicle on the highways of Louisiana, other than under said laws, it shall be deemed equivalent to an appointment by said nonresident of the secretary of state to be his agent or attorney for service of process in any action against him growing out of any accident or collision in which he may be involved while operating his motor vehicle on the highways or while his vehicle is operated by his authorized chauffeur. * * * The mere operation of a motor vehicle by a nonresident, or by his authorized chauffeur, upon the highways of Louisiana, is tantamount to an agreement on his part that, if there arises any action against him growing out of an accident or collision, the process served upon the secretary of state shall have the same legal force and validity as though served on him personally. * * * Every ad-

vantage this law intended for the defendants to enjoy was extended to them in this case, and, even though some irregularities did exist in the handling of the matter, such irregularities do not strike the citation and service with nullity. We think the lower court correctly overruled the exceptions to the citation."

Where the statute expressly provides that the assistant secretary of state shall have authority to perform the duties of the secretary a statutory provision for the service on the nonresident owner of motor vehicles by serving the secretary of state such service on his assistant is sufficient if made in compliance with the statutory provision, as is indicated in the case of *Derrickson v. Barnett* (Del.), 160 Atl. 907, where the court said: "The service was made on the assistant secretary of state, and the plaintiff claims that it was invalid in view of the act providing for the appointment of such officer. * * * 'The assistant secretary of state shall have authority to perform all the duties required of the secretary of state except as ex officio member of any state commission or board.' Clearly the purpose of this act was to provide that some one should be in the office, and be to all intents and purposes, the secretary of state in the absence of that official. The purpose was to make the assistant secretary the secretary for the time being. * * * It is argued that the acceptance of service of process was not one of the official duties of the secretary of state. True, it was not one of his usual duties, but under the statute the secretary of state is specifically designated as the official upon whom service could be made. One of his duties was to accept such service and in his absence from the office the duty was imposed upon the assistant. The assistant secretary provided for in the act was intended to be more than the ordinary deputy or assistant. He was intended to be, in an emergency, practically the secretary of state. Any other construction of the statute would, we think, be highly technical. * * * That the secretary was absent because of protracted illness, was a fact so generally known that it may be considered in ascertaining the intention of the legislature in passing this act. Such illness and absence created an emergency that had to be met by the legislature, and it was met by a special act providing for an assistant secretary of state."

Where there was no return receipt of the defendant which the statute required as evidence of the service of notice on such a party through the secretary of state, the absence of the receipt, when due to the refusal of the defendant to receive the letter and accept the service is sufficiently explained and its production will

be waived, because the defendant will not be permitted to defeat the purpose of the act by his own conduct in attempting to evade its effects. This principle is established and discussed as follows in the case of *Creadick v. Keller* (Del.), 160 Atl. 909: "It is argued that the service is incomplete and invalid because the defendant's return receipt was not filed as required by the statute. But it does appear from plaintiff's affidavit and is not denied, that the defendants were nonresidents and that the plaintiff sent to each of the defendants by registered mail a copy of the process, with notice of service. It further appears from the affidavit and envelopes attached thereto that a letter containing the required information was sent by registered mail to each of the defendants, at their correct address, to be delivered to addressees only; that a return receipt was requested; that said letters were delivered to the defendants and each of them refused to accept delivery thereof. It is clear from the record that the plaintiff's failure to fully comply with the requirements of the statute was caused by the defendant's refusal to receive the letters and sign the receipt. Such refusal made it impossible for the plaintiff to file the return receipt with his declaration. It would create an intolerable situation if the defendant could, by his own wilful act, or refusal to act, prevent the plaintiff from maintaining his action. It is a situation the court can not recognize."

Strict compliance with the statute providing for consent to service through the secretary of state on nonresident owners of motor vehicles is required to make the service effective, and where the defendant was not informed as required by the statute that such service is as effective as if it had been made personally within the state the service is insufficient to give the court jurisdiction in the matter, for as the court said in the case of *Felstead v. Eastern Shore Express, Inc.* (Del.), 160 Atl. 910: "The affidavit the plaintiff is required to file with his declaration must show the defendant's nonresidence, the sending by registered mail a copy of the process with notice of service, to the defendant, and that the defendant was informed that the service, 'shall be as effective to all intents and purposes as if it had been made upon such nonresident personally within this state, and that such notice was sent to the nonresident forthwith by registered mail.' In the present case it does not appear that the defendant was informed that the service of the process, of which notice is given, would be as effectual to all intents and purposes

as if it had been made upon the defendant personally within this state, and that such notice was sent to the defendant by registered mail. It may be admitted that the statute in the part we are now considering, was unskillfully drawn, and that some of its provisions are not clearly expressed. They may seem unreasonable, but they must be complied with to give the court jurisdiction. 'Where the statute prescribes that jurisdiction is to be obtained in a particular way, then the requirements of the statute must be complied with, or jurisdiction can not be acquired.' *Winslow v. Staten Island R. R. Co.*, 51 Hun 298, 4 N. Y. S. 169, 170. Because the requirements of the statute were not complied with in the particulars mentioned, the motion to quash must be sustained."

§ 857. **Aircraft not classed as motor vehicle.**—Aircraft will not be classed as motor vehicles under a statute making it a criminal offense to transport stolen vehicles from one state to another, when such statute, by its express terms, indicates that it covers vehicles which run on land and not those flown in the air; and a party, operating an airplane which he knew to be stolen, can not be convicted for transporting it, as was decided in the case of *McBoyle v. United States*, 283 U. S. 25, 75 L. ed. 816, 51 Sup. Ct. 340: "The petitioner was convicted of transporting from Ottawa, Illinois, to Guymon, Oklahoma, an airplane that he knew to have been stolen, and was sentenced to serve three years' imprisonment and to pay a fine of \$2,000. The judgment was affirmed by the circuit court of appeals for the tenth circuit. 43 Fed. (2d) 273. A writ of certiorari was granted by this court on the question whether the National Motor Vehicle Theft Act applies to aircraft. * * * But in everyday speech 'vehicle' calls up the picture of a thing moving on land. Thus, in Rev. Stat. section 4, title 1, section 4, intended, the government suggests, rather to enlarge than to restrict the definition, 'vehicle' includes every contrivance capable of being used 'as a means of transportation on land.' And this is repeated, expressly excluding aircraft, in the Tariff Act, June 17, 1930, chapter 497, section 401 (b) 46 Sta. at L. 590, 708, U. S. C. title 19, section 1401. So, here, the phrase under discussion calls up the popular picture. For, after including automobile truck, automobile wagon and motorcycle, the words 'any other self-propelled vehicle not designed for running on rails' still indicate that a vehicle in the popular sense, that is a vehicle running on land, is the theme. It is a vehicle that runs, not something, not commonly called a ve-

hicle, that flies. Airplanes were well known in 1919 when this statute was passed, but it is admitted that they were not mentioned in the reports or in the debates in congress. It is impossible to read words that so carefully enumerate the different forms of motor vehicles and have no reference of any kind to aircraft, as including airplanes under a term that usage more and more precisely confines to a different class."

CHAPTER 30

MUNICIPAL OWNERSHIP

| Section | Section |
|---|---|
| 860. Ownership unless regulation adequate. | 867. Municipal ownership and interests of public. |
| 861. Power of municipality to own and operate municipal public utilities. | 868. Policy of municipal ownership legislative not judicial question. |
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§ 860. **Ownership unless regulation adequate.**—The only alternative or preventive of municipal ownership of municipal public utilities is their adequate regulation and control by the municipality or by a state or municipal commission acting under authority conferred upon it for that purpose by the state. With an efficient regulation and control of the service furnished by municipal public utilities and the rates charged for it, the necessity for municipal ownership as a means of regulation and control in the majority of cases at least would disappear, although the power of the municipality to own and operate its municipal public utilities should always be available. This position of the municipality is necessary to put it on an equality with the municipal public utility and to enable it properly to conserve its interests and secure for its inhabitants at all times efficient service at reasonable rates whenever regulation fails to secure this.

§ 861. **Power of municipality to own and operate municipal public utilities.**—The city may generally acquire a utility under the power of eminent domain in addition to the right to purchase and operate any utility by virtue of an express reservation in

the original franchise or contract made with the municipality,¹ or pursuant to statutory authority expressly granted or necessarily implied.² Although the municipal public utility belonging to private capital serves a public purpose and performs a public duty, it is not by virtue of that fact exempt from the exercise of this right of eminent domain belonging to the municipality or other agency of the state when acting under proper statutory authority; for the state and its agency, the municipality or commission, when authorized for that purpose may at any time exercise the power of eminent domain over private property within its jurisdiction.

§ 862. Eminent domain always available to municipality.—The rule of law is well established that the legislative authorities of the state or the municipality can not by contract or legislative enactment surrender or barter away their right to exercise the power of eminent domain, nor can they preclude their successors from doing so. The exercise by the state or the municipality, pursuant to authority delegated to it by the state, of the right to take title to property for a public purpose on paying just compensation for it is always available. Nor is the exercise of this right limited to the taking of property which is devoted to private purposes only, but property which is being used for public purposes, as well, may be taken in this way by the state or the municipality, which holds it for a more general disinterested purpose, and subject to a larger scope of usefulness and for the benefit and general welfare of the entire public. As the court in the case of *In re Brooklyn*, 143 N. Y. 596, 38 N. E. 983, 26 L. R. A. 270, decided in 1894, so well expressed it: "While the purpose of the waterworks company was public in its nature, it can not be said to be strictly identical with the municipal purpose. A municipal corporation is a public and governmental agency. It holds property for the general benefit, with a larger scope of use. When acquired by the municipality of the city of Brooklyn, the appellant's property would become a part of a general system, under a single management, and conducted essentially as a public work. If, in order the better to subserve the public use, the appropriation of private property is necessary, even though it be already devoted to a similar use, the right to make it is incident to the legislative power, and it is necessary for the general good that the right be conceded. All property within the state is subject to the right of the legislature to appropriate it for a neces-

¹ Chapter 7, *supra*.

² Chapters 4 and 5, *supra*.

sary and reasonable public use, upon a just compensation being provided to be made therefor, and there can be no distinction in favor of corporations whose franchises and operations impart to them a quasi-public character. We think it very apparent that the public use to which the appellant's property is to be devoted by the provisions of the act does differ, and that it is of higher and wider scope."

By constitutional enactment in some jurisdictions, the power of eminent domain is given the state and its municipalities under which privately owned public utilities may be taken for state or municipal ownership which is declared to be a greater public use. This principle is discussed as follows in the case of *Los Angeles v. South Gate*, 108 Cal. App. 398, 291 Pac. 654: "There can be no doubt but that the legislature in this instance conferred upon appellant municipality (assuming the constitutionality of the statute) the right to erect and maintain the proposed electric transmission lines. * * * The appellant is clothed with a right and has done everything within its power to evidence its selection of particular streets for the purpose of exercising that right. The power to adjust the controversy is none the less judicial. * * * Respondent's argument, therefore, that there is no 'natural, intrinsic or constitutional distinction' to be drawn between a municipality and a private corporation engaged in the business of a public utility is foreclosed of that consideration which might otherwise be afforded it. The people in the constitution have declared in no uncertain terms that such a distinction exists and have gone so far as to provide for the condemnation of the property of a privately owned public utility to what we must perforce say is a greater public use when acquired by 'the state, or any county, city and county, incorporated city or town, municipal water district, irrigation district or other public corporation or district.'"

A municipality acting under legislative authority may acquire only such part of a public utility plant as it may need, provided it pays any damages sustained from such taking to the residue of the property. In sustaining the right of a municipality to purchase a part rather than an entire plant, because its needs only require so much of the plant, the court indicated its attitude toward municipal ownership, which was expressed as follows in the case of *Public Service Co. v. Loveland*, 79 Colo. 216, 245 Pac. 493: "The city properly followed the procedure indicated in bringing the suit. As to subdivision 70 of C. L. section 8987, counsel for the company argue that it does not authorize the con-

demnation of previously existing plants, nor any plants except those built under the provisions of subdivision 67. We have no doubt that, if the general assembly meant the section to bear so narrow a construction, the exception would have been incorporated in the statute. We must disagree with counsel that the legislature intended such an exception that they failed to make. * * * The whole spirit of the law is, so far as possible, to permit under reasonable restrictions the privilege of self-government, and the acquisition of such plants are [is] within the discretion of the municipality. * * * The company is entitled to the actual cash value of the property taken; excluding the value of the franchise or right-of-way through the streets and exceptions noted in subdivision 67 of section 8987, and also damages, if any, to the property not taken. C. L. 1921, section 6327. The necessities and requirements of the city—not what the company would like to dispose of—is [are] the determining factor as to what shall be taken. The company is compensated by payment for what the city takes from it, and also by payment for damages to the residue of its property in the way that the statutes prescribe. It can not force the city to buy or condemn that which it would be a waste of money to acquire, and the city itself is without such right. For the city to dissipate its revenues in such manner would be prodigal and improper and a misuse of public funds.”

§ 863. **Just compensation condition not limitation on its exercise.**—In the New York case, *supra*, on appeal to the Supreme Court of the United States in *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 41 L. ed. 1165, 17 Sup. Ct. 718, decided in 1897, that tribunal said: “All private property is held subject to the demands of a public use. The constitutional guaranty of just compensation is not a limitation of the power to take, but only a condition of its exercise. Whenever public uses require, the government may appropriate any private property on the payment of just compensation. That the supply of water to a city is a public purpose can not be doubted, and hence the condemnation of a water supply system must be recognized as within the unquestioned limits of the power of eminent domain. * * * The state, which, in the first place, has the power to construct a water-supply system and charge individuals for the use of the water, may condemn a system already constructed, and continue to make such charge. This is not turning property from one private corporation to another, but taking property from a private corporation and vesting the title in some municipal corporation

for the public use. It is not essential to a public use that it be absolutely free and without any charge to anyone."

§ 864. **Motive of municipal and private owners compared.**—The reason for permitting the state or the municipality to acquire the private property of the municipal public utility, although it is serving a public purpose, is indicated by the fact that the motive and purpose of the municipality or the state is to secure adequate and efficient municipal public utility service for its citizens at the most reasonable rate possible, which is often in sharp contrast to the very natural attitude of the privately owned municipal public utility in its desire to receive the greatest possible return on its investment, for which it renders such service as may be required of it or as seems necessary to secure these returns, for as the court, in the case of Louisville Home Tel. Co. v. Louisville, 130 Ky. 611, 113 S. W. 855, decided in 1908, expressed it: "From this view of the subject it will readily be seen that the primary object a city would have, in contracting for or procuring the service of such utilities, is not the revenue to be obtained for the city, but the securing of good and efficient service, and upon such terms as will, in the judgment of the city's governing body, promote the greatest good, not alone to those who use the utility, the telephone for instance, but to the entire community, including the city government."

In fixing the rates for municipal public utility plants the order should provide for a reasonable interest return on the investment. In cases where the property of the plant is not taxable, such rates should not include taxes as a cost of the service. The benefits of municipal ownership, including the elimination of salaries, the advantages of financing at more advantageous rates, and the exemption of such property from taxation, are indicated and discussed in the case of Logansport v. Public Service Comm., 202 Ind. 523, 177 N. E. 249, 76 A. L. R. 838, P. U. R. 1931E, 179, where the court said: "It appears to us that the purpose of municipalities which have decided to own utilities may have been to reduce the cost of the service to their users and at the same time to secure a reasonable return on the investments for the cities which otherwise would go to private corporations. The taxpayer who is not an electric light consumer, has his money tied up in a municipal light plant the same as the taxpayer who is also a consumer. It is unfair that the money obtained from the former by taxation should be allowed to work for the benefit of others. It should earn a reasonable amount which should go to the general fund of the city and thereby reduce his taxes.

Local taxes should not be gathered in the guise of utility rates, but rates which provide for no more than a reasonable interest return on the investment are not local taxes in disguise. * * *

A city by its citizens and taxpayers in deciding to operate a utility must have in mind, not only the advantages gained thereby, such as the elimination of official salaries, the power to finance its project at advantageous interest rates, etc., but also the provision of the law which exempts the property of a city from taxation. Taxes not being actually levied and paid, they should not be included as a cost of service. *Cavanaugh v. Whitefish Municipal Water Utility* (Mont.), P. U. R. 1922E, 198, 216."

§ 865. **Failure of regulation necessitates ownership by municipality.**—The practical justification for municipal ownership of municipal public utilities is the failure sometimes experienced under any other form of regulation and control to secure satisfactory service at a fair uniform rate. Naturally the purpose and the chief motive of the privately owned municipal public utility is to secure the largest possible return on its investment, while the motive of the municipality in furnishing such service by its own plant is not primarily selfish or mercenary beyond the point of making the business self-sustaining; its chief object being rather to furnish efficient comprehensive service to its inhabitants at cost. That the municipality has the power and that it is its duty to provide public utility service itself, where it is not furnished satisfactorily by private enterprise at reasonable rates, is the consensus of opinion of our courts generally.³

³ *United States. Boston, Massachusetts v. Jackson*, 260 U. S. 309, 67 L. ed. 274, 43 Sup. Ct. 129; *Joslin Mfg. Co. v. Providence, Rhode Island*, 262 U. S. 668, 67 L. ed. 1167, 43 Sup. Ct. 684.

Federal. Cudahy Packing Co. v. Omaha, Nebraska, 277 Fed. 49; *Wichita Water Co. v. Wichita, Kansas*, 280 Fed. 770; *Mono Power Co. v. Los Angeles, California*, 284 Fed. 784, certiorari denied in 262 U. S. 751, 67 L. ed. 1214, 43 Sup. Ct. 700; *Franklin Trust Co. v. Loveland, Colorado*, 3 Fed. (2d) 114; *Puget Sound Power & Co. v. Seattle, Washington*, 5 Fed. (2d) 393, certiorari denied in 269 U. S. 565, 70 L. ed. 414, 46 Sup. Ct. 24; *Oshkosh v. Fairbanks, Morse & Co.*, 8 Fed. (2d) 329; *Mutual Oil Co. v. Zehrung*, 11 Fed.

(2d) 887; *Seattle, Washington v. Puget Sound Power & Co.*, 15 Fed. (2d) 794; *Gallardo v. Porto Rico Light & Co.*, 18 Fed. (2d) 918; *Cudahy Packing Co. v. Omaha, Nebraska*, 24 Fed. (2d) 3, certiorari denied in 278 U. S. 601, 73 L. ed. 530, 49 Sup. Ct. 9; *Oregon-Washington Water Service Co. v. Hoquiam*, 28 Fed. (2d) 576, rehearing denied in 29 Fed. (2d) 566; *Puget Sound Power & Co. v. Seattle, Washington*, 29 Fed. (2d) 254; *Fairbanks, Morse & Co. v. Texas Power & L. Co.*, 32 Fed. (2d) 693; *Hodges v. Bluff City, Tennessee*, 32 Fed. (2d) 779; *Karel v. Eldorado, Texas*, 32 Fed. (2d) 795; *Southern California Utilities, Inc. v. Huntington Park*, 32 Fed. (2d) 868, certiorari denied in 280 U. S. 587, 74 L. ed. 636, 50

Sup. Ct. 36; Oklahoma Nat. Gas Corp. v. Municipal Gas Co., 38 Fed. (2d) 444; West Texas Utility Co. v. Spur, 38 Fed. (2d) 466; McDowell v. Barberton, 38 Fed. (2d) 786; National Lead Co. v. New York, 43 Fed. (2d) 914; Quarles v. Appleton, 45 Fed. (2d) 675; Todd v. Citizens Gas Co., 46 Fed. (2d) 855, certiorari denied in 283 U. S. 852, 75 L. ed. 1459, 51 Sup. Ct. 561; Kentucky-Tennessee Light & Power Co. v. Paris, Tennessee, 48 Fed. (2d) 795; Jerseyville, Illinois v. Connett, 49 Fed. (2d) 246; Hoskins v. Orlando, Florida, 51 Fed. (2d) 901; Texas Elec. Service Co. v. Seymour, 54 Fed. (2d) 97, P. U. R. 1932A, 442; Campbell, Missouri v. Arkansas-Missouri Power Co., 55 Fed. (2d) 560.

Alabama. Pilcher v. Dothan, 207 Ala. 421, 93 So. 16; State v. Commander, 211 Ala. 230, 100 So. 223; Alabama Water Co. v. Anniston, 215 Ala. 120, 110 So. 36; Culpepper v. Phenix City, 216 Ala. 318, 113 So. 56; Andalusia v. Alabama Utilities Co., 222 Ala. 689, 133 So. 899; Brooks v. Oxford, 223 Ala. 264, 135 So. 575; Alabama Water Co. v. Anniston, 223 Ala. 355, 135 So. 585.

Arizona. Buntman v. Phoenix, 32 Ariz. 18, 255 Pac. 490; Tucson v. Sims (Ariz.), 4 Pac. (2d) 673.

Arkansas. Bank of Commerce v. Huddleston, 172 Ark. 999, 291 S. W. 422; McCoy v. Holman, 173 Ark. 592, 292 S. W. 999.

California. Miller v. Los Angeles, 185 Cal. 440, 197 Pac. 342; Los Angeles Gas & Co. v. Los Angeles, 188 Cal. 307, 205 Pac. 125, P. U. R. 1924A, 790; Mahoney v. San Francisco, 201 Cal. 248, 257 Pac. 40; Hunt v. Boyle, 204 Cal. 151, 267 Pac. 97; Pasadena v. Chamberlain, 204 Cal. 653, 269 Pac. 630; Irish v. Hahn, 208 Cal. 339, 281 Pac. 385; Mobley v. Board of Public Works, 44 Cal. App. 167, 186 Pac. 412; Jochimsen v. Los Angeles, 54 Cal. App. 715, 202 Pac. 902; Santa Clara Valley Land Co. v. Meehan, 62 Cal. App. 531, 217 Pac. 787; Cooper v. Reardon, 71 Cal. App. 649, 236 Pac. 180; Merced Irr. Dist.

v. San Joaquin Light & Co. Corp., 101 Cal. App. 153, 281 Pac. 415; Los Angeles v. South Gate, 108 Cal. App. 398, 291 Pac. 654; San Diego v. La Mesa, Lemon Grove & Co. Irr. Dist., 109 Cal. App. 280, 292 Pac. 1082; Garrett v. Swanton (Cal. App.), 3 Pac. (2d) 1025; Golden Gate Bridge & Co. Dist. v. Felt (Cal. App.), 5 Pac. (2d) 585.

Colorado. Holyoke v. Smith, 75 Colo. 286, 226 Pac. 158; People v. Loveland, 76 Colo. 188, 230 Pac. 399; Newton v. Ft. Collins, 78 Colo. 380, 241 Pac. 1114; Public Service Co. v. Loveland, 79 Colo. 216, 245 Pac. 493; Lamar v. Wiley, 80 Colo. 18, 248 Pac. 1009, P. U. R. 1927A, 175; Searle v. Haxtun, 84 Colo. 494, 271 Pac. 629; Inland Utilities Co. v. Scholl, 87 Colo. 73, 285 Pac. 771; Missemer v. Hugo, 89 Colo. 222, 1 Pac. (2d) 94.

Connecticut. New Haven Water Co. v. Russell, 86 Conn. 361, 85 Atl. 636.

District of Columbia. New York v. Federal Radio Comm., 59 App. D. C. 129, 36 Fed. (2d) 115.

Florida. St. Petersburg v. Pinellas County Power Co., 87 Fla. 315, 100 So. 509; Walters v. Tampa, 88 Fla. 177, 101 So. 227; Hamler v. Jacksonville, 97 Fla. 807, 122 So. 220; Miami Water Co. v. Miami (Fla.), 134 So. 592.

Georgia. Brumby v. Board of Lights & Waterworks, 147 Ga. 592, 95 S. E. 7; Byrd v. Alma, 166 Ga. 510, 143 S. E. 767; Morton v. Waycross, 173 Ga. 298, 160 S. E. 330; Alford v. Eatonton (Ga.), 162 S. E. 495; Newton v. Moultrie, 39 Ga. App. 702, 148 S. E. 299.

Idaho. Idaho Power & Co. v. Blomquist, 26 Idaho 222, 141 Pac. 1083, Ann. Cas. 1916E, 282; Miller v. Buhl, 48 Idaho 668, 284 Pac. 843; Kiefer v. Idaho Falls, 49 Idaho 458, 289 Pac. 81.

Illinois. Springfield Gas & Co. v. Springfield, 292 Ill. 236, 126 Pac. 739, 18 A. L. R. 929, affd. in 257 U. S. 66, 66 L. ed. 131, 42 Sup. Ct. 24, P. U. R. 1922A, 576.

Indiana. Fox v. Bicknell, 193 Ind. 537, 141 N. E. 222; Logansport v.

Public Service Comm. (Ind.), 177 N. E. 249, P. U. R. 1931E, 179; Cooper v. Middletown, 56 Ind. App. 374, 105 N. E. 393; Huntington v. Morgen, 90 Ind. App. 573, 162 N. E. 255, 163 N. E. 599; Indiana Service Corp. v. Warren (Ind. App.), 180 N. E. 14.

Iowa. Sloan v. Cedar Rapids, 161 Iowa 307, 142 N. W. 970; Edgerly v. Ottumwa, 174 Iowa 205, 156 N. W. 388; Meader v. Sibley, 197 Iowa 945, 198 N. W. 72; Iowa Elec. Co. v. Winthrop, 198 Iowa 196, 198 N. W. 14; Muscatine Lighting Co. v. Muscatine, 205 Iowa 82, 217 N. W. 466; Knotts v. Nollen, 206 Iowa 261, 218 N. W. 563; Mapleton, Inc. v. Iowa Public Service Co., 209 Iowa 400, 223 N. W. 476, P. U. R. 1929B, 359; Mote v. Carlisle, 211 Iowa 392, 233 N. W. 695; Van Eaton v. Sidney, 211 Iowa 986, 231 N. W. 475, P. U. R. 1930E, 103; Johnston v. Stuart (Iowa), 226 N. W. 164; Christensen v. Kimballton (Iowa), 236 N. W. 406.

Kansas. State v. Stafford, 92 Kans. 343, 140 Pac. 868; Humphrey v. Board of Comrs., 93 Kans. 413, 144 Pac. 197; Baxter Springs v. Bilger, 110 Kans. 409, 204 Pac. 678, P. U. R. 1922C, 716; State v. McCombs, 129 Kans. 834, 284 Pac. 618.

Kentucky. Kenton Water Co. v. Covington, 156 Ky. 569, 161 S. W. 988; Covington v. O. F. Moore Co., 218 Ky. 102, 290 S. W. 1066; Wilson v. Covington, 220 Ky. 798, 295 S. W. 1068; Bowling Green v. Kirby, 220 Ky. 839, 295 S. W. 1004; Scottsville v. Hewitt, 234 Ky. 656, 28 S. W. (2d) 984; Sturgis v. Christenson, 235 Ky. 346, 31 S. W. (2d) 386; Danville v. Vanarsdale (Ky.), 48 S. W. (2d) 5.

Louisiana. Young v. Bossier City, 154 La. 625, 98 So. 45; Montgomery v. LaFayette, 154 La. 822, 98 So. 259; Young v. Bossier City, 155 La. 652, 99 So. 494; Vicksburg, Shreveport & C. Co. v. Monroe, 164 La. 1033, 115 So. 136; Middleton v. Police Jury, 169 La. 458, 125 So. 447; Peoples Gas & C. Co. v. Ruston (La.), 141 So. 36; Johnson v. Natchitoches, 14 La. App. 40, 129 So. 433.

Maryland. Hagerstown v. Littleton, 143 Md. 591, 123 Atl. 140; West

v. Byron (Md.), 138 Atl. 404, P. U. R. 1927E, 286.

Massachusetts. Boston v. Treasurer & Receiver General, 237 Mass. 403, 103 N. E. 390; Stoneham v. Commonwealth, 249 Mass. 112, 144 N. E. 83; Moody v. Weymouth (Mass.), 177 N. E. 80.

Michigan. Attorney General v. Detroit, 225 Mich. 631, 196 N. W. 391; Bay City Plumbing & C. Co. v. Lind, 235 Mich. 455, 209 N. W. 579; Michigan United Light & C. Co. v. Hart, 235 Mich. 682, 209 N. W. 937; Worden v. Detroit, 241 Mich. 139, 216 N. W. 461.

Minnesota. Backus v. Virginia, 123 Minn. 48, 142 N. W. 1042; State v. Kilkenny, 170 Minn. 424, 212 N. W. 899; Guth v. Staples, 183 Minn. 552, 237 N. W. 411.

Mississippi. Carnaggio v. Greenwood, 142 Miss. 885, 108 So. 141.

Missouri. Bell v. Fayette, 222 Mo. 184, 296 S. W. 1047; Public Service Comm. v. Kirkwood, 319 Mo. 562, 4 S. W. (2d) 773; National Enameling & C. Co. v. St. Louis (Mo.), 40 S. W. (2d) 593; Speas v. Kansas City (Mo.), 44 S. W. (2d) 108; Sanders v. Carthage (Mo. App.), 9 S. W. (2d) 813.

Nebraska. Futscher v. Rulo, 107 Nebr. 521, 186 N. W. 536; Metropolitan Utilities Dist. v. Omaha, 112 Nebr. 93, 193 N. W. 858; John A. Creighton Real Estate Co. v. Omaha, 112 Nebr. 802, 201 N. W. 657, 204 N. W. 66; Cook v. Beatrice, 114 Nebr. 305, 207 N. W. 518; State v. Johnson, 117 Nebr. 301, 220 N. W. 273; Carr v. Fenstermacher, 119 Nebr. 172, 228 N. W. 114; Hevelone v. Beatrice, 120 Nebr. 648, 234 N. W. 791.

New Jersey. Boonton v. United Water Sup. Co., 88 N. J. Eq. 61, 102 Atl. 454; East Jersey Water Co. v. Newark, 96 N. J. Eq. 231, 125 Atl. 578; Plainfield-Union Water Co. v. Plainfield, 83 N. J. L. 332, 85 Atl. 321; Livermore v. Millville, 85 N. J. L. 655, 90 Atl. 330; East Jersey Water Co. v. Newark, 96 N. J. L. 231, 125 Atl. 578; Franklin v. Horton, 97 N. J. L. 22, 25, 116 Atl. 175,

176; Board of Trade of Newark v. Newark, 97 N. J. L. 52, 116 Atl. 172; In re Harrison (N. J.), 151 Atl. 215; Austin v. Union Beach (N. J.), 160 Atl. 318.

New Mexico. Albuquerque v. Water Sup. Co., 24 N. Mex. 468, 174 Pac. 217, 5 A. L. R. 519; Raton v. Raton Ice Co., 26 N. Mex. 300, 191 Pac. 516.

New York. New York City v. Brooklyn City R. Co., 232 N. Y. 463, 134 N. E. 533; People v. Conservation Commission, 175 App. Div. 5, 161 N. Y. S. 522; Potsdam Elec. & Co. v. Potsdam, 49 Misc. 18, 97 N. Y. S. 190; Brooklyn City R. Co. v. Whalen, 111 Misc. 348, 181 N. Y. S. 208, affd. in 191 App. Div. 737, 182 N. Y. S. 283, affd. in 229 N. Y. 570, 128 N. E. 215.

North Carolina. Rouse v. Kinston, 188 N. Car. 1, 123 S. E. 482, 35 A. L. R. 1203; Elizabeth City Water & Co. v. Elizabeth City, 188 N. Car. 278, 124 S. E. 611; Cook v. Mebane, 191 N. Car. 1, 131 S. E. 407; Edenton Ice & Co. Storage Co. v. Plymouth, 192 N. Car. 180, 134 S. E. 449; Board of Trustees v. Henderson, 196 N. Car. 687, 146 S. E. 808; Holmes v. Fayetteville, 197 N. Car. 740, 150 S. E. 624, P. U. R. 1930A, 369; Mewborn v. Kinston, 199 N. Car. 72, 154 S. E. 76.

North Dakota. Logan v. Bismark, 49 N. Dak. 1178, 194 N. W. 908.

Ohio. State v. Lynch, 88 Ohio St. 71, 102 N. E. 670, 48 L. R. A. (N. S.) 720, Ann. Cas. 1914D, 949; State v. Weiler, 101 Ohio St. 123, 128 N. E. 88; Travelers Ins. Co. v. Wadsworth, 109 Ohio St. 440, 142 N. E. 900, 33 A. L. R. 711; Board of Education v. Columbus, 118 Ohio St. 295, 160 N. E. 902; Western Reserve Steel Co. v. Cuyahoga Heights, 118 Ohio St. 544, 161 N. E. 920; Roettinger v. Cincinnati, 16 Ohio App. 273, affd. in 105 Ohio St. 145, 137 N. E. 6; Alcorn v. Deckebach, 31 Ohio App. 142, 166 N. E. 597.

Oklahoma. Williams v. Norman, 85 Okla. 230, 205 Pac. 144; Moomaw v. Sions, 96 Okla. 202, 220 Pac. 865; State v. Short, 113 Okla. 187, 240

Pac. 700; Beauchamp v. Hallett, 115 Okla. 27, 241 Pac. 161; St. Louis-San Francisco R. Co. v. Andrews, 137 Okla. 222, 278 Pac. 617; Perrine v. Bonaparte, 140 Okla. 165, 282 Pac. 332; In re Murray, 140 Okla. 240, 285 Pac. 80; St. Louis-San Francisco R. Co. v. County Excise Board, 142 Okla. 176, 286 Pac. 345; Ruth v. Oklahoma City, 143 Okla. 266, 287 Pac. 406; Schmoldt v. Oklahoma City, 144 Okla. 208, 291 Pac. 119; Price v. Water Dist. No. 8, 147 Okla. 11, 293 Pac. 1092.

Oregon. Mollencop v. Salem (Ore.), 8 Pac. (2d) 783.

Pennsylvania. Tyrone Gas & Co. v. Tyrone Borough, 299 Pa. 533, 149 Atl. 713, P. U. R. 1930D, 490; Wentz v. Philadelphia, 301 Pa. 261, 151 Atl. 883.

South Carolina. Paris Mountain Water Co. v. Greenville, 110 S. Car. 36, 96 S. E. 545; Sullivan v. Charleston, 133 S. Car. 189, 133 S. E. 340; Green v. Rook Hill, 149 S. Car. 234, 147 S. E. 346; McDaniel v. Bristol, 160 S. Car. 408, 158 S. E. 804.

South Dakota. Spangler v. Mitchell, 35 S. Dak. 335, 152 N. W. 339, Ann. Cas. 1918A, 373; Tubbs v. Custer City, 52 S. Dak. 458, 218 N. W. 599; Travaille v. Sioux Falls (S. Dak.), 240 N. W. 336.

Tennessee. Keenan v. Trenton, 130 Tenn. 71, 168 S. W. 1053, Ann. Cas. 1916B, 519.

Texas. Denton v. Denton Home Ice Co., 119 Tex. 193, 27 S. W. (2d) 119; Texas Elec. & Co. v. Vernon (Tex.), 265 S. W. 176; Vernon v. Montgomery (Tex.), 265 S. W. 188; Andrus v. Crystal City (Tex.), 265 S. W. 550; Texas Elec. & Co. v. Vernon (Tex.), 266 S. W. 600; Griffith v. Sowell (Tex.), 287 S. W. 673; Newton v. Groesbeck (Tex.), 299 S. W. 518; Teague v. Sheffield (Tex.), 26 S. W. (2d) 417; Creager v. Hidalgo County Water Imp. Dist. No. 4 (Tex. Com. App.), 283 S. W. 151; Keel v. Pulte (Tex. Com. App.), 10 S. W. (2d) 694; Bass v. Clifton (Tex. Civ. App.), 261 S. W. 795, error dismissed in 268 U. S. 681, 69 L. ed. 1154, 45 Sup. Ct. 638; Highland

The attitude of our courts toward an increase of the sphere of municipal activity is indicated in their sustaining the power of municipalities to furnish municipal bus service, not only within the limits of the particular municipality but between it and other municipalities, because this is for the benefit of the public and for the convenience of the inhabitants of the municipality. This principle is established and discussed as follows in *Southwestern Bus Co. v. North Olmsted*, 41 Ohio App. 525, 181 N. E. 491: "The village of North Olmsted, a municipal corporation, is now operating a municipal bus service from the westerly limits of the village to the public square in the city of Cleveland. * * * There are no decisions construing that portion of section 6, article 18, of the Ohio Constitution, which permits the municipality to 'sell and deliver to others any transportation service of such utility * * * in an amount not exceeding in either case fifty per cent of the total service or product supplied by such utility within the municipality.' We are of the opinion that neither the test of mileage nor the number of passengers carried is the proper unit of measurement to be employed in determining fifty per

Park v. Guthrie (Tex. Civ. App.), 269 S. W. 193; *South Texas Public Service Co. v. John* (Tex. Civ. App.), 7 S. W. (2d) 942; *Tyrell & Co. v. Highlands* (Tex. Civ. App.), 44 S. W. (2d) 1059.

Utah. Utah Savings & Co. v. Salt Lake City, 44 Utah 150, 138 Pac. 1165; *Muir v. Murray City*, 55 Utah 368, 136 Pac. 433; *Logan City v. Public Utilities Comm.*, 72 Utah 536, 271 Pac. 961, P. U. R. 1929A, 378; *Barnes v. Lehi City*, 74 Utah 321, 279 Pac. 878.

Virginia. Kirkpatrick v. Board of Superiors, 146 Va. 113, 136 S. E. 186; *Etheredge v. Norfolk*, 148 Va. 795, 139 S. E. 508; *Mt. Jackson v. Nelson*, 151 Va. 396, 145 S. E. 355; *Warwick County v. Newport News*, 153 Va. 789, 151 S. E. 417.

Washington. Griffin v. Tacoma, 49 Wash. 524, 95 Pac. 1107; *Scott v. Tacoma*, 81 Wash. 178, 142 Pac. 467; *Uhler v. Olympia*, 87 Wash. 1, 151 Pac. 117, 152 Pac. 998; *State v. Collins*, 93 Wash. 614, 161 Pac. 467; *State v. Seattle*, 104 Wash. 634, 177 Pac. 671, 180 Pac. 137; *Hayes v. Seattle*, 120 Wash. 372, 207 Pac. 607; *Puget Sound Power & Co. v. Seat-*

tle, 142 Wash. 580, 253 Pac. 1083; *State v. Seattle*, 154 Wash. 475, 282 Pac. 829; *Wylde v. Seattle*, 162 Wash. 583, 299 Pac. 385; *Burkheimer v. Seattle*, 162 Wash. 645, 299 Pac. 381; *Blade v. LaConner* (Wash.), 9 Pac. (2d) 381.

West Virginia. Wheeling v. Natural Gas Co., 74 W. Va. 372, 82 S. E. 345.

Wisconsin. Janes v. Racine, 155 Wis. 1, 143 N. W. 707; *Janesville Water Co. v. Janesville*, 156 Wis. 655, 146 N. W. 784; *Green Bay & Canal Co. v. Kaukauna Gas, Elec. Light & Co.*, 157 Wis. 412, 147 N. W. 701; *Milton v. McGowan Water, Light & Co.*, 176 Wis. 658, 187 N. W. 661, P. U. R. 1922E, 528; *Milton v. Railroad Commission*, 185 Wis. 294, 201 N. W. 381; *Pabst Corp. v. Milwaukee*, 190 Wis. 349, 208 N. W. 493, P. U. R. 1926D, 290; *Wisconsin Gas & Co. v. Atkinson*, 193 Wis. 232, 213 N. W. 873, P. U. R. 1927D, 14; *Pabst Corp. v. Milwaukee*, 193 Wis. 522, 213 N. W. 888, 215 N. W. 670, P. U. R. 1928B, 503; *Pabst Corp. v. Railroad Commission*, 199 Wis. 536, 227 N. W. 18.

cent of the service. Courts must take judicial notice that modern transportation equipment has in many instances eliminated space; that communities in such proximity to each other, as are North Olmsted Falls and the city of Cleveland, are so closely connected with each other as to be interdependent. Were the court to adopt the standard of mileage in determining the 'fifty per cent of the total service,' as used in the constitution, it would impose an arbitrary provision which would destroy the very purpose of the establishment by the village of North Olmsted of the motorbus service, which was principally to provide means of communication between the village of North Olmsted and the city of Cleveland; as it must follow that, if mileage is the test, the village would have no right at all to operate a bus line between its limits and the city of Cleveland. We hold that equipment and facilities, plus the human agencies which are reasonably necessary to operate them, constitute public utility service, and that, measured by this test, the village of North Olmsted is operating its transportation service within the powers granted to it by the constitution of Ohio. * * * It is our conclusion that the village of North Olmsted has not exceeded its constitutional power either in the establishment of the transportation service or in the manner of operating the same."

§ 866. **Tendency and attitude of courts toward municipal ownership.**—In the case of *Mayo v. Washington*, 122 N. Car. 5, 29 S. E. 343, 40 L. R. A. 163, decided in 1898, Clark, J., in a dissenting opinion which was later expressly upheld by the same court in the case of *Fawcett v. Mt. Airy*, 134 N. Car. 125, 45 S. E. 1029, 63 L. R. A. 870, 101 Am. St. 825, in speaking of the attitude of the court toward the policy of municipal ownership and of the tendency of such ownership to become more fully established in practice, said: "It would seem, however, that city ownership of water as well as electric lighting plants is a matter vested in the discretion of the city government. Light and water, sewerage and sanitation, paving and fire protection are necessities, and are objects to be obtained by municipal organization. * * * There is an unmistakable trend the world over toward municipal ownership of lighting, waterworks, and even (to some extent) street railways. Judge Dillon refers to this, and intimates that it is commended by wisdom and sound policy.⁴ * * * In Germany two-thirds of the cities own their electric lighting and car plants, and the proportion is increasing. The same is true of the

⁴ Dillon Mun. Corp., § 691, n. 1.

other countries of continental Europe, there being a great increase in municipal ownership since Judge Dillon wrote. In Great Britain and Ireland 203 cities and towns, being in fact every city of any importance save five, own their lighting plants, not only for their own corporate uses, but for furnishing light to citizens, and the average price of gas furnished to the citizen, with a profit, too, to the municipalities is fifty-four cents per thousand. In this country, too, a large number of cities own their gas plants.

* * * A large and increasing number of cities and towns in the United States own their electric lighting plants, with the result that the cost to the municipalities, from official reports, is less than one-third of the average cost in cities buying their lights from private companies. The number of cities in this country owning their waterworks is 1690 out of a total of 3196 having water supply; and municipal ownership is steadily increasing. In the fifty largest cities in the Union, nineteen have recently changed from private ownership to municipal ownership, leaving only nine of the fifty which are still dependent for their water supply on private companies. * * * The general movement of the age in which we live is towards the ownership and operation of these franchises by the people of towns and cities, for themselves, through the agency of their municipal corporations, as one of the recognized and chief purposes of town and city charters."

This decision has been quoted from at length for its statistical value especially, and for its conclusions which seem to be based upon an extensive investigation of the question. The facts speak for themselves and indicate that the municipal ownership of the plants providing these public utilities in towns and cities was widely established at the time of the writing of this opinion, and that the tendency as indicated by such facts is toward a further increase of such ownership.

In the decisions of the courts in connection with this subject no suggestion is found indicative of anything but the utmost confidence in the principles involved, nor are any reasons assigned for denying their broadest application in practice. The attitude of the courts on such a subject, it is believed, gives the most conservative and accurate indication of the tendency of the times and of the probable solution of the question.

The favorable attitude of the court toward municipal ownership in permitting one city to serve another is indicated in the case of *Meader v. Sibley*, 197 Iowa 945, 198 N. W. 72, as follows: "The statute does provide and purposely so, that the municipality may deal with its own inhabitants and with outsiders as well.

* * * As pointed out in the Ocheyedan case, the incorporated town of Sibley had authority under the statute to enter into the contract in question for the sale of its product, to an outside municipality. * * * The legislature clearly and expressly provided for the precise situation we have here. It directly authorized one municipality to 'sell' to another municipality. * * * We hold that the contract was valid; that the incorporated town of Sibley could not modify the price for electrical current provided for therein by the enactment of a city ordinance, nor could it levy a tax upon the property of appellees for the operation and maintenance of the electric plant."

While the courts require the same service from waterworks plants municipally owned, as from those privately owned, the attitude of the courts toward municipal ownership is shown by their relieving the municipality from a penalty for making a charge for service without submitting it for the approval of the railroad commission, especially where it appears that the rate charged by the municipality was reasonable and that it was later approved by the commission. This principle is established and discussed as follows in the case of *Pabst Corp. v. Milwaukee*, 193 Wis. 522, 213 N. W. 888, 215 N. W. 670, P. U. R. 1928B, 503, where the court said: "There is no proof that the rates collected by the city since 1921 are unreasonable or that they would have been held excessive if legally adopted. The fact that the railroad commission has entered an order permitting the establishment of the same rates that have been collected since 1921 tends to show that the rates actually collected by the city were in fact reasonable. * * * After having dealt with the city for so long a time as if it were a municipal proprietor, not subject to regulation by the state, the plaintiff corporation ought not in justice and equity to be permitted to assert that the city was not acting in such capacity for the purpose of subjecting the city to such a harsh penalty as the payment of treble damages."

The attitude of our courts toward the policy of municipal ownership is indicated in its refusal to interfere in an action brought by a taxpayer against a municipality in extending its railway system, especially where it was shown that the cost of the extension would be paid out of the income of the railway system, and that the building of such an extension imposed no additional servitude, and gave an abutting property owner no right to complain, for as the court said in the case of *Worden v. Detroit*, 241 Mich. 139, 216 N. W. 461: "The common council after such hearing, not only rescinded its former action, which it had a perfect

right to do, although as a practical proposition the rescinding of the former action was not very effective, as the tracks had already been taken up, but it also directed the construction of a new line, one not then in existence. This was not beyond its power, but was clearly within it. * * * No tax or assessment either general or special will be levied to pay for the construction of this line. All the cost will be paid for out of the income of the system. But even in taxpayers' cases it is incumbent on the plaintiff to establish the threatened levy of an unlawful tax. So, if we treat the bill as one seeking to restrain the unlawful expenditures of public funds, it is still incumbent on the plaintiffs to establish that the threatened expenditure is unlawful. This they have failed to do. Our attention has been called to no mandatory provision of the city charter which has been violated, and we have found none. Since Mr. Justice Cooley wrote the opinion in *Grand Rapids & Indiana R. R. Co. v. Heisel*, 38 Mich. 62, 31 Am. Rep. 306, it has been the settled law of this state that the maintenance and operation of a street railway upon a street does not impose such a new burden and servitude as to authorize the owner of abutting land to complain. While what was said by Mr. Justice Cooley on that subject was dictum and had been so regarded by this court, it has uniformly been followed in cases too numerous to cite."

§ 867. **Municipal ownership and interests of public.**—That the public interests are best conserved by municipal ownership is fully recognized and characteristically expressed by the court in the case of *Ogden City v. Bear Lake &c. Waterworks Co.*, 16 Utah 440, 52 Pac. 697, 41 L. R. A. 305, to the effect that: "The people usually get fleeced when the city places its waterworks in the hands of private parties. Public-spirited men are not at all times free from the undue influence of self-interest." But whether the municipality finds that the amount of control necessary in any case requires the municipal ownership of the plants which provide it and its citizens with these public utilities, or only the ownership without the operation by the public, or merely the statutory regulation of private plants, it is submitted on the authorities herein given that the attitude of our courts favors a decided increase in the sphere of municipal activity.

To a similar effect the court in the case of *Albuquerque v. Water Supply Co.*, 24 N. Mex. 368, 174 Pac. 217, 5 A. L. R. 519, said: "It will thus be seen that under this section an incorporated city is given authority to issue negotiable bonds for the purpose of securing funds for the construction or purchase of a

system for supplying water. * * * The section of the statute quoted in connection with clause 67, section 3564, which authorizes the erection and operation of gas and electric works by cities, and to provide means for protection from fire, and to issue and sell bonds for the purpose, clearly confers upon cities and towns the power and authority to purchase a system of waterworks."

That current indebtedness outstanding against a plant, except valid liens, can not be transferred as a charge on the property and assumed by the city was clearly decided in *Green Bay &c. Canal Co. v. Kaukauna Gas, Electric Light &c. Co.*, 157 Wis. 412, 147 N. W. 701, as follows: "Does a municipality in acquiring a public utility subject to the provisions of section 1797m80 et seq., Stats. 1911, render itself liable for unpaid rent on a lease owned by the utility and acquired in the proceedings? When the defendant Kaukauna Company received an indeterminate permit, it thereby agreed that the city of Kaukauna might acquire its property subject to the provisions of the public utility law. That law, however, authorizes the municipality to acquire nothing but the property of the public utility. It does not authorize it to acquire the corporation itself or its obligations, or to incur any indebtedness on account of any liability of the corporation. The statute limits the municipality strictly to the acquisition of the property of the public utility, and such was the scheme consented to by the Kaukauna Company when it received its indeterminate permit. It can not now be heard to say that in acquiring such property the city also assumed an obligation to pay for rental of power used by it long before the city took over its plant. In acquiring such property the municipality must take it subject to any valid liens thereon up to the amount of compensation fixed by the railroad commission; but it does not assume a liability for any indebtedness arising out of the use of power furnished the public utility before it acquires the plant. Such indebtedness must be liquidated by the public utility."

That assets and liabilities are ascertained as of the time the title finally passes to the plant is decided in *James v. Racine*, 155 Wis. 1, 143 N. W. 707, as follows: "By accepting the indeterminate permit the Racine Water Company stipulated to sell its property to the city under the terms and conditions contained in the public utility act as supplemented and safeguarded by the constitution of the state. This it was competent to do, and this it did by accepting an indeterminate permit. We are therefore called upon only to see that the provisions of such act and of the constitution are complied with in the making of the purchase.

* * * The method of acquiring a public utility under the statute is a complex one. Between the time the option to purchase is exercised by the city and the time it takes actual possession of the acquired utility a considerable period of time must necessarily elapse, and much work must be done by the railroad commission. It is given a year in the first instance within which to complete its labors after notice is served upon it by the city. Section 1797m82. The proceeding is *sui generis*, and but little aid can be had from adjudicated cases in determining when, under the provisions of the statute, the city incurs the indebtedness within the meaning of the constitutional provision first above referred to. It is evident that at the time the vote is taken to acquire the plant only a rough guess or estimate can be made of the total amount that may finally have to be paid therefor, because, pursuant to the law, the railroad commission must determine the quantum of property to be taken, the price to be paid therefor, and the terms and conditions under which the purchase-price shall be paid. * * * The statute nowhere prescribes when the title to the property shall vest in the municipality. But it is evident from the provisions of the act taken collectively, as well as from specific language in particular sections, that the transaction for the purchase of the plant is not deemed complete in all its essential details until the railroad commission files its certificate. Then the exclusive use of the plant is transferred to the municipality; and, if payment is not then made, interest must be allowed in order that the purchase-price shall constitute just compensation. *Appleton Waterworks Company v. Railroad Commission*, 154 Wis. 121, 142 N. W. 476. Up to that time the public utility exercises full control over its property the same as it did before the city elected to purchase. * * * Upon reflection it becomes plain that the amount of the debt must be ascertainable at the time the constitution requires the municipality to determine whether it has exceeded its constitutional limit of indebtedness, and that is at the time the debt is incurred. * * * The final consummation of the proceedings is not reached till the railroad commission files its certificate. Then the terms and the mutual agreement become fixed, then the public utility furnishes the consideration for the debt, and then the debt is created within the meaning of the constitution. *Merrill Ry. & L. Co. v. Merrill*, 80 Wis. 358, 49 N. W. 965; *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 19 Sup. Ct. 77, 43 L. ed. 341."

That the city may purchase rather than manufacture electrical energy for its plant is clearly established in the case of Moo-

maw v. Sions, 96 Okla. 202, 220 Pac. 865, where the court held: "The authority given the municipality to undertake the operation of a business enterprise necessarily carries with it the authority to deal with the same in the same manner that private corporations would deal with its property, subject only to constitutional and legislative restrictions. In the instant case it is not necessary to pass upon the question of the right of the city to entirely abandon the operation of its light system or to make a sale thereof, as the contract in this case attempts to do neither. The particular effect of the contract under consideration is to provide for the purchase of electric current to be used by the city in maintaining its electric light system instead of generating electricity at its own plant. This was a question for the board of trustees to determine in the exercise of the best business judgment of the members of such board in the operation of a quasi private enterprise, and the contract executed for that purpose was valid unless entered into through caprice, fraud, or oppression."

§ 868. **Policy of municipal ownership legislative not judicial question.**—The policy of municipal ownership and the expediency of its adoption in any particular case is a legislative or business question which the municipal authorities must decide in the course of their administration of the municipal affairs within the authority conferred upon the city. It is not a judicial question, nor will the courts review the wisdom or expediency of the adoption of the policy of municipal ownership, but will confine themselves to the question of the authority of the municipality to do so. In sustaining an option of the appellant municipality to purchase the property and franchise rights of a municipal public utility and in upholding the transfer of its option to another municipal public utility where the effect of exercising and transferring the option was intended for the public benefit, the court in the case of Indianapolis, *Indiana v. Consumers Gas Trust Co.*, 144 Fed. 640, decided in 1906,⁵ said: "In none of the citations, state or general, are there any reasons stated that seem inconsistent with the proposition that a corporation, engaged in a service of public utility, may contract for a sale to the municipality of all of its property therein, either through a condition accepted in the franchise from the city, or through subsequent arrangement. The question whether municipal ownership is favorable to the public interest, is neither involved in, nor open to, judicial in-

⁵ The Supreme Court sustained it on a writ of certiorari, in 203 U. S. 592, 51 L. ed. 331, 27 Sup. Ct. 779. this decision by refusing to consider

quiry. Assuming that such ownership is authorized, and is contemplated or demanded by the municipality, we are convinced that this proviso, treated alone as a contract of sale on the part of the gas company, is not within the inhibition of the rule—not *ultra vires*. The public policy which is mentioned in the cases cited, as opposed to an implication of charter power to turn over its property to another and 'abnegate the performance of its duties to the public,' has no application to the transfer to the public—the municipality—of property used in public service."

That the policy of determining on the question of municipal ownership is not judicial but legislative and a matter of business is clearly indicated in the case of *Pilcher v. Dothan*, 207 Ala. 421, 93 So. 16, as follows: "The municipalities of this state are authorized to construct and operate waterworks systems to supply wholesome water for municipal purposes and for the use of their inhabitants. They may locate their plants within or without their territories; and may issue bonds to provide funds for such purposes, as well as secure the payment of the bonds by mortgage on the systems or pledge of the revenues to be derived therefrom. Code, sections 1260, 1261, 1262; Acts Special Session 1921, pp. 6-8. * * * Aside from the debt limit provisions of the constitution, there is, so far as we can discover, no restriction in our laws upon the municipality with respect to the cost or magnitude of an authorized municipal improvement or facility. That is left to the validly exercised discretion of the local government. * * * The effect of that decision and of those just noted is that, if the primary purpose of the municipal government in exercising its discretion is to serve an authorized municipal purpose, the incidental excess product of the operation may be lawfully sold for private consumption."

That the policy of municipal ownership is legislative or a matter of business and not judicial is well expressed by the court in the case of *Livermore v. Millville*, 85 N. J. L. 655, 90 Atl. 380, as follows: "The Supreme Court held, and properly, that under the Act of 1894 (P. L., p. 477; 3 Comp. St. 1910, p. 3548), the city was invested with power to erect an electric light distributing system of poles, wires, etc. (Neither the act nor the ordinance contemplated a generating plant), and to raise the required money by taxation; and by the Act of 1902 (P. L., p. 782; 1 Comp. St. 1910, p. 938) was further authorized to raise by bond issue money for any purpose for which it might raise money by taxation. Three other objections are advanced. The first is that the system is intended to supply private consumers, as well as to

serve the public uses, and that for such private supply there is no statutory authority. An examination of the specification shows that the present plan is to construct for public lighting only, but in such a way later on private lighting may be added. We can not see that there is anything illegal in this. It is true that under the statutes relied on private lighting is not authorized. It may be true that a public plant that is adaptable readily to private lighting also may be more expensive than one that is not; but, granting this, the question of so constructing the plant is one of business judgment, and it may be excellent judgment so to do in anticipation of a possible enlargement of municipal powers by legislative authority."

A municipal corporation acting under proper statutory authority may acquire and operate an electric light plant for the purpose of securing a monopoly of the business in serving itself and its inhabitants. In sustaining such an action, although it gave the municipality a monopoly, the court said that it was for the public benefit. This principle is announced and discussed as follows in the case of *Fairbanks, Morse & Co. v. Texas Power & Light Co.*, 32 Fed. (2d) 693: "We do not think that appellant as a taxpayer was entitled to relief on the ground that the city, in arranging for the acquisition and operation of its own electric light plant had the purpose to monopolize the business of furnishing electric light and power for the use of the city and its inhabitants. Unless forbidden by statute, an authorized acquisition and operation by a municipality of such a public utility as an electric light plant may be accompanied by a purpose to prevent competition by another owner of such a utility. *City of Brenham v. Brenham Water Co.*, 67 Tex. 542, 565, 566, 4 S. W. 143. The city was authorized to own and operate an electric light system. Revised Civil Statutes of Texas 1925, article 1108. The exercise of that power is for public benefit, not for private benefit. We have not been referred to any statute which makes it unlawful for a municipality to acquire the exclusive right to own and operate such a public utility for the benefit of its inhabitants."

Under proper statutory authority, municipal corporations, in the operation of their waterworks plants, may provide that charges for service may be treated as a tax and made a lien on the real estate where the service is furnished, for as the court said in the case of *McDowell v. Barberton*, 38 Fed. (2d) 786: "Barberton, Ohio, owned and operated waterworks under the management and control of its director of public service. His

authority is found in sections 3957 and 3958, Ohio General Code. In virtue thereof, he promulgated certain regulations having the effect of ordinances, to wit: That charges for water shall be made against the premises supplied and the bill sent to the last known address of the owner; that water rents shall be due quarterly and if not paid within thirty days the water may be turned off; that new ownership of premises shall not eliminate the responsibility for payment of arrearages; that every person desiring water must apply in writing for service pipe and connection with the mains; that the application must be signed also by the owner of the property or his duly authorized agent with the distinct understanding that the property is to be held liable for all water rents accrued or which shall accrue against it. * * * At the time of bankruptcy the Rubber Products Company owed the city \$1,351.80 for water. The city insisted (1) that this was a tax entitling it to priority under section 64 (a) Bankr. Act 1898 (USC tit. 11, c. 7, section 194 (a) [11 USCA, section 104 (a)]); and (2) that it had a lien on the real estate of the bankrupt to secure payment. The referee denied these contentions. The judge sustained them. He found (1) that the obligation was a tax; and (2) that to secure its payment the city had a lien upon the real estate of the bankrupt. We think the judge reached the correct result. * * * The evident purpose of sections 3957 and 3958, Ohio General Code, though somewhat awkwardly expressed, was to give the city better security for the collection of its water rents, taking them out of the class of contract debts and characterizing them at least as special assessments upon real estate. There was no provision that their assessment and collection should be according to any constitutional guaranty as to uniformity, or to any legislative regulation as to method, but this was unnecessary because the legislature was dealing with a local matter only."

In the absence of proper legislative authority, however, a municipality is not permitted to make a delinquent bill for water furnished on the premises a lien against them, nor can the owner of the premises or a later tenant be required to make the payment or be denied service because a former bill for services rendered to another remains unpaid, for as the court said in the case of *Etheredge v. Norfolk*, 148 Va. 795, 139 S. E. 508: "The authorities are also practically unanimous that the regulation of a water company or ordinance of a municipality which requires the property owner to pay a delinquent bill for water furnished the tenant of the premises, which the owner has not contracted to

pay, is unreasonable and void, unless a lien is given on the premises by statute, or there is at least some statutory authority therefor by virtue of the charter or otherwise. * * * Neither the charter of the city of Norfolk nor any other statute provides a lien on property for water rents; nor is there any statutory authority, so far as we are advised, for the ordinance in question. This being so, said ordinance, in so far as it attempts to hold a property owner personally responsible for the payment of arrearages for water consumed by the tenant on the premises, is unreasonable and void. * * * The regulation is also unreasonable in its effects, because it requires the property owner—as in this case—to pay the delinquent water bill of a former tenant, which he is under no obligation to pay, in order to secure another tenant and keep his premises occupied, and denies the incoming tenant the use of the water to which he is entitled when he occupies the premises and offers to comply with the regulations required of consumers. * * * In fact, under its present ordinances, if a tenant or any consumer fails to pay his water bill, the city has the lawful right to cut off the water until he does pay it, and, if he continues to occupy the premises with the water shut off, can subject him to a fine; which of itself seems not only a proper method of enforcing payment, but a reasonable police regulation, as well.”

As the policy of municipal ownership is a legislative and not a judicial question the rate which a municipality may charge for public utility service and the disposition of the proceeds, so long as they are used for municipal purposes, rests largely in the discretion of the municipal authorities, whose judgment in such matters will not be set aside by the courts unless unreasonable, fraudulent, or ultra vires, for as the court said in the case of *Travaille v. Sioux Falls* (S. Dak.), 240 N. W. 336: “We have pointed out that there is no statute requiring the application of water collections and charges solely to expenditures in connection with the operation of the waterworks plant, and it does not appear from the allegations of the complaint that the city of Sioux Falls has otherwise obligated itself to apply the net income or other portion of such proceeds to the payment of interest and principal of bonds. * * * A municipal corporation is not required to limit the rate to the actual cost of furnishing water, but may fix a rate which is reasonable, resulting in a profit to the municipality. 27 R. C. L. 1436; 1 Farnham on Waters, p. 855, section 798; *Wagner v. Rock Island*, 146 Ill. 139, 34 N. E. 545, 21 L. R. A. 519; *Twitchell v. Spokane*, 55 Wash. 86, 104

Pac. 150, 24 L. R. A. (N. S.) 290, 133 Am. St. 1021. It is not alleged that the city of Sioux Falls is charging an unreasonable rate for water. If the revenues derived from such rate are applied to municipal purposes, we fail to understand wherein the defendants have contravened any statutory provision."

§ 869. **Sale to municipality without statutory authority.**—The distinction between municipal and private ownership is supported by the common observation, made by the courts, which is thereby recognized and given the effect of law, that the public interests in public utility plants are so much more secure when controlled by public than by private capital that an agreement of a public or quasi-public corporation to sell to the one may be allowed, in the absence of express statutory authority, while the law refuses to permit such an agreement to stand when made with private parties. This must be the chief consideration for upholding the options to purchase such plants, which are now so commonly taken by the municipality when granting franchises. Such a precaution is a very wise one for the city to take, for it provides the opportunity for the municipality at any time to take over such property and control it absolutely for the public benefit. While experience shows that this action is often necessary, the fact that it can be done so summarily acts as an important factor in forcing public consideration into the service rendered by the private concern.

That the city may not add a distributing system to a privately owned plant under an ordinance to erect a plant itself is decided in *Cooper v. Middletown*, 56 Ind. App. 374, 105 N. E. 393, where the court said: "It is sufficient for the purposes of the question which we are called on to decide to say that the averments of the complaint show that such town by such resolution of its said board determined to build an electric light plant. It is further averred, in effect, that such board is not building such a plant, and does not intend to build one, but that, on the contrary, it is about to purchase poles, wire, and equipment to be placed in the streets of said town at an expense of more than its bond issue, and has entered into a contract with its coappellee to purchase of it electric current to light said town. These averments are, we think, sufficient to show that such board is not using the funds derived from said bond sale for the purpose authorized by said statute and the resolution passed pursuant thereto. * * * While such appliances and equipment might in some cases be treated and spoken of as a distributing plant, we are of the opinion that such equipment falls short of being

'electric light works,' within the meaning of the statute under consideration. We think it clear that the 'electric light works' contemplated by this statute, and hence voted for by the citizens of said town, comprehends and includes not only the equipment and appliances necessary to receive and carry the current, but also a generating plant."

This continuing favorable attitude of the court on this question was indicated in the case of *Fox v. Bicknell*, 193 Ind. 537, 141 N. E. 222, as follows: "The Bicknell Water Company is selling its plant to the city of Bicknell, the consideration to be paid by bonds which state upon their face that they are not the obligations of the city but are payable only out of a special fund to be derived from the income from the plant. The city is not required to pay more for water for municipal purposes than the service is reasonably worth. There will not be one cent of money derived from taxation going into this fund that would not go into the coffers of the Bicknell Water Company if it continued to operate the plant. The city of Bicknell is not agreeing to pay any money raised by taxation, and is not pledging or mortgaging the property that it already has; nor is it pledging income or revenues from any source except the plant. Hence there is no legal or moral obligation on the part of the city to pay, its only duty being to manage the plant and take care of the fund."

An option of a municipality to purchase a privately owned public utility gives the municipality a right to do so, but does not subject it to the obligation of acquiring the property, nor preclude it from taking advantage of acquiring the property by eminent domain; and in no event can the municipality be forced to make the purchase until it elects to do so in accordance with the provisions of the franchise granting the option, for as the court said in the case of *Oregon-Washington Water Service Co. v. Hoquiam*, 28 Fed. (2d) 576: "Without deciding whether by the proceedings referred to the city has become unconditionally bound to purchase the system, we are clearly of the opinion that the decree of dismissal was right. The option of the city provided by the franchise ordinance was to purchase the system at the end of fifteen years 'after the completion of the same,' or at the end of any subsequent five-year period. The five-year period now material would not expire until the thirtieth of September, 1928. This suit was commenced June 1, 1928, and the decree of dismissal appealed from was entered July 9, 1928. In the most favorable view to appellants, the ordinance of April 6, 1927, constituted an election to purchase pursuant to the terms of the

original ordinance; that is, on September 30, 1928, and not before. The notice of desire or intention to purchase did not accelerate the date of either plaintiff's obligation to sell or the city's obligation to buy. * * * Under the terms of the ordinance 'due process of law' was to be invoked to fix the price only in case the parties could not agree. Neither party can resort to the courts until, without success, it has in good faith used reasonable efforts to agree upon a fair price. As is well known, litigation for such a purpose is extremely expensive and neither party should have that burden imposed until the necessity for such procedure becomes apparent. * * * Moreover, if it be assumed that the price named by plaintiff was in fact fair, and that otherwise the offer was not out of harmony with the contract, defendant was not bound to accept it forthwith. After concluding to purchase the system and the passage of the ordinance declaring its desire so to do, it had the right to make a detailed investigation during the period elapsing between the date of such election and the date the purchase was to be made, for the purpose of determining what would be a fair price. Such a determination, if intelligently made, requires the services of specially qualified appraisers and involves time. The city charges that plaintiff's precipitate haste in bringing this suit was for the purpose of forestalling an appropriate action in eminent domain. While its motives may not be highly material, if, as is asserted, there is provision made by the state statutes for a proceeding of that character, in such case, it may be a serious question whether plaintiff can be admitted to a court of equity, unless and until the city declines or fails seasonably to take the requisite steps for condemnation. Federal courts of equity do not exercise jurisdiction to render relief where there is a plain, adequate, and complete remedy at law."

§ 870. **Extension of sphere of municipal activity necessary.**—The power of the municipality to own and operate its municipal public utilities as well as the favorable attitude of the courts in extending the sphere of municipal activity in this connection is well illustrated by decisions from the Supreme Court of New York. In the case of *Sun Printing & Publishing Assn. v. New York*, 152 N. Y. 257, 46 N. E. 499, 37 L. R. A. 788, decided in 1897, where the action was to restrain the defendants from constructing a rapid transit system for the city of New York pursuant to statutory provisions to that effect, the court upheld the constitutionality of the statute and the right of the city pursuant to its provisions to construct such a rapid transit system for

the reason that it was a "city purpose" properly included within the terms of the constitution providing that "nor shall any such county, city, town or village be allowed to incur any indebtedness except for county, city, town or village purposes." In this liberal construction of the power of the municipality the court was evidently influenced by the fact that the municipality had failed in its attempt to induce private capital to undertake the construction and operation of such a rapid transit system which the court found to be absolutely necessary for the common good and the general welfare of the inhabitants of the defendant municipality. In providing for the construction of such a system by the municipality itself the statute stipulated that if the system should be constructed at the expense of the municipality it should "be deemed to be a part of the public streets and highways of said city."

That the courts are favorable to the policy of municipal ownership and that the acquiring of public utility plants to be paid for out of the operating revenues received from them does not create an indebtedness of the city is clearly decided in *Uhler v. Olympia*, 87 Wash. 1, 151 Pac. 117, 152 Pac. 998, as follows: "We think that bonds issued under the special statute providing for the acquisition of a public utility, where the ordinance provides that the cost shall be paid out of the gross revenues of the system when acquired, is not a thing to be considered in estimating the debt limit of the city. The charge is upon those who use the water, and not upon others. The revenues to be received under the plan proposed are not moneys of the city. They do not partake of the character of general funds, nor can the general fund be invaded if they are not sufficient. The system for collecting revenues and for the payment of these special bonds, provided by statute and by the ordinance, is in principle the same as if they were collected to pay street assessments. * * * The object of municipal ownership is to give the citizen the best possible service at the lowest possible price. Under the ordinance the citizen who is taxed to the extent of his use of the utility is entitled to all benefits. When the plant is maintained, the interest paid, and a sinking fund is provided to retire the bonds, the taxpayer—the water user—who is primarily burdened with the task of meeting the maintenance, betterments, interest, and cost of the system, is entitled to the benefit. If these things are not true, there can be no virtue in public ownership, and the object of the city as revealed by its preliminary ordinance would not be accomplished."

To the effect that the court will find sufficient power by implication to permit the city to embrace the policy of municipal ownership is determined by the decision in *Keenan v. Trenton*, 130 Tenn. 71, 168 S. W. 1053, Ann. Cas. 1916B, 519: "The great weight of authority is to the effect that an express grant of power to light streets, carries by necessary implication power to construct or acquire by purchase a lighting plant for that purpose. *Rushville Gas Co. v. Rushville*, 121 Ind. 206, 23 N. E. 72, 6 L. R. A. 315, 16 Am. St. 388; *Mauldin v. Greenville*, 33 S. Car. 1, 11 S. E. 434, 8 L. R. A. 291; *Ellinwood v. Reedsburg*, 91 Wis. 134, 64 N. W. 885, and cases cited below. In respect to the right of a city to construct, purchase, or maintain such a plant for supplying electric current to private consumers there is a lack of harmony in the reported cases; but we believe that the trend of the later cases is in favor of power to that end in municipal corporations; and, in our opinion, the current of authority to that effect must increase, reason and the spirit of the age alike demanding it."

§ 871. **Limitation.**—That municipalities have not the capacity to engage in moving picture shows because the purpose is not municipal is indicated by the court in *State v. Lynch*, 88 Ohio St. 71, 102 N. E. 670, 48 L. R. A. (N. S.) 720, Ann. Cas. 1914D, 949: "But the case before us presents the question whether the establishment and operation of a moving picture show is within 'the powers of local self-government,' and the question has received the attention of able counsel. * * * Consciousness of inadequate provision forbids an attempt at a conceptual definition of the phrase, 'all powers of local self-government,' to be applied to all cases that might arise. But an obviously correct descriptive definition is sufficient for the case in hand. They are such powers of government as, in view of their nature and the field of their operation, are local and municipal in character. The force of the terms employed requires the inclusion of such powers to be exercised by officials, who in some manner and to some extent represent the sovereignty of the people. It as clearly excludes the exercise of functions which are appropriately exercised by caterers and impresarios. The suggestion that moving picture exhibitions might be made educational is gratuitous, because that it is not their natural object. It is unavailing because article 6 of the constitution shows that education supported by taxation is to be conducted by a 'system of common schools throughout the state.'"

Just as municipalities have been denied the right to own and operate moving picture shows for entertainment and educational purposes, because they are not municipal purposes, in this later case it is held that a municipal rapid transit commission could not provide motion pictures concerning the work of the commission at the expense of the municipality, because this was in excess of their authority which was to provide a plan for rapid transit service for the city. In holding that this duty did not authorize the commission to expend municipal funds to provide motion pictures, the court, in the case of *Continental Guaranty Corp. v. Craig*, 240 N. Y. 354, 148 N. E. 548, said: "The commissioner, as will be noted in his testimony, says that the motion picture is simply a substitute for the addresses and speeches which the members have themselves made to the public at various times upon transit conditions. No doubt this is so, but we have not heard of the commissioners charging the city for these addresses, nor do we understand that they believe it would be a proper charge to pay lecturers and speakers to go about through the city, proclaiming the work of the commission and the evils which they were undertaking to abolish. There is no objection to the motion picture and the information which it very interestingly imparts. The objection is to the cost of the production and exhibition, as being something beyond that contemplated by the legislature in passing this Rapid Transit Act. * * * We therefore can find no justification for this expense incurred by the transit commission. It was not called upon to educate the public in transit matters. It was no part of its duty to advise the public as to its plan and purposes, other than in the method provided by this law. Its work was to devise the plan."

Municipal authority to own, operate, and maintain a gas light plant or a plant for gas lighting purposes does not authorize the municipality to engage in a general public utility gas business, including the construction or acquiring of gas plants, wells, and lands or leases and the necessary distributing systems to sell natural or artificial gas, under the decision in the case of *Peoples Gas & Fuel Co. v. Ruston (La.)*, 141 So. 36, where the court said: "Authority conferred by the Lawrason Act upon a municipal corporation to own, operate, and maintain 'a gas light plant,' or a plant for gas lighting purposes, falls immeasurably short of the extraordinary power which defendant claims, in this case, to exercise for the purpose of engaging in a general public utility gas business, involving the constructing or acquiring of gas manufacturing plants, gas distributing systems, gas wells, gas lands,

gas holdings, or leases, and gas pipe lines with necessary equipment, appurtenances, and furnishings, to distribute and sell natural or artificial gas, the title to which shall be in the public. None of the constitutional provisions or statutes relied upon by defendant confers upon it the power or authority to embark upon such an enterprise as a general public utility gas business."

Since a municipality, in furnishing public utility service to its inhabitants, acts in a proprietary or business capacity it is bound by the same legal principles as are privately owned public utilities and can not collect for a service which was not furnished and for which no contract or connection had been made; much less may it sell the property in an effort to collect for any such service. This principle is established and discussed as follows in the case of *Austin v. Union Beach* (N. J.), 160 Atl. 318: "On March 22, 1927, the borough passed an ordinance dealing with the subject of the water supply of the municipality. It purported to comprise a complete regulation of the water supply, including a schedule of rates. The prosecutor never used any of the water supplied by the borough, and, in fact, had no connection with the water mains. Nevertheless, he was presented with a bill for water service, and, upon nonpayment thereof, his property was on September 3, 1930, sold at tax sale by the collector. It seems clear that the sale was improper. Under *Jersey City v. Morris Canal & Banking Co.*, 41 N. J. L., 208, 88 Atl. 1073; *Ford Motor Co. v. Kearny*, 91 N. J. L., 671, 103 Atl. 254, L. R. A. 1918D, 361; *Olesiewicz v. Camden*, 100 N. J. L., 336, 126 Atl. 317; and *Lehigh Valley R. Co. v. Jersey City*, 103 N. J. L., 574, 138 Atl. 467, it is established that a municipality engaging in the sale of water for profit is exercising proprietary and business powers, and is governed by the same rules as control an individual or business corporation under like circumstances. There was no contract for service, and none was furnished in this case. Therefore a charge therefor was unlawful."

§ 872. **Practical necessity long recognized as basis of municipal ownership.**—In the course of its opinion, following the decision of the case of *People v. Kelly*, 76 N. Y. 475, in sustaining the power of the cities of New York and Brooklyn to construct the Brooklyn bridge connecting their respective territory at their joint expense, which this court at that early date held to be a city purpose, the court in the case of *Sun Printing &c. Assn. v. New York*, 152 N. Y. 257, 46 N. E. 499, 37 L. R. A. 788, recognizing the practical phases of the matter, said: "The situation, however in the city of New York, is most peculiar. A long, narrow

island lies between two rivers, so narrow in places that there are practically but two or three streets through which the masses must reach its business center. The population of the city during the last half century has increased from three hundred thousand to over a million and a half people. The travel upon its existing railroads during the last twenty years has increased from 150,000,000 in 1874 to upwards of 448,000,000 in 1894. It was conceded upon the argument that the crowded and congested condition of the travel upon the streets in the city renders the proposed structure necessary. These considerations have induced us to give to the provisions of the act a most liberal construction. The commissioners located the road, and tried to induce private capital to construct and operate it. In this they have failed, and the situation is such that the city must itself construct the road, or go without it. Here we have a demand for a great public highway, which private enterprise and capital will not construct. It is necessary for the welfare of the people, and is required by them. It is public in character, and is authorized by the legislature. Our conclusion is that, under the circumstances and situation here presented, the proposed road may properly be held to be 'for a city purpose,' and that the acts are not in contravention of the provisions of the constitution."

§ 873. **Ownership without operation permitted.**—This case was expressly sustained and the principle extended in its application in the case of *Admiral Realty Co. v. New York*, 206 N. Y. 110, 99 N. E. 241, Ann. Cas. 1914A, 1054, decided in 1912, where the court permitted the municipality not only to construct at its own expense a rapid transit system, but to lease it to private capital to be operated in connection with a system owned by the lessee for the purpose of securing a uniform continuous system of transfers for its inhabitants. In the course of this very practical and progressive decision the court said: "The question whether the city may make this arrangement with the Interborough Company seems to resolve itself into the fundamental inquiry whether a municipality, having made a contract, may subsequently bargain, under full legislative authority, for a modification of that contract, so that it will be adjustable to altered and then existing circumstances, paying an adequate consideration, either for what the other party gives up, or for what it secures under the modifications. It seems to me obvious that a municipality has such power. * * * For if it be once decided that the municipality has the right to bargain with the Interborough Company for a modification of the latter's lease of the

old subways, so as to bring them into a unified system of transportation with the new ones, the consideration to be paid for such modification, in the absence of fraud or collusion, which is not charged, rests in the discretion and judgment of the public officials; and certainly, as observed before, it is not objectionable that, instead of burdening the municipality with more rapid and oppressive methods of payment, it is provided that this consideration shall be paid from year to year out of the earnings of the railroads. * * * The city will own all the subways which are to be operated together. It is true that at present the Interborough Company has a separate interest in some of them as lessee. But by the proposed contract this lease is to be modified and superseded by a new agreement, whereby the city becomes reinvested with a substantial control thereof, and relets them, in connection with its new subways, under one contract for operation as a single and entire system. * * * And the question is whether the municipality, instead of building subways at an enormous expense over the entire territory, may build them in part of it, and then make a contract for their operation with the owner of the privately owned system, under which the latter agrees to operate its system in conjunction with the subways, and subject to a single fare. It seems to me that it may thus do; and that the statement of the proposition very largely supplies the argument in its favor."

§ 874. **Constitutionality of municipal ownership unquestioned.**—The constitutionality of the statutory enactments of New York just discussed and the right of New York City pursuant to such statutory enactments to construct, maintain, and operate a rapid transit system on the theory that it is a necessary municipal purpose is expressly sustained and approved by the court in the case of *Underground R. Co. v. New York*, New York, 116 Fed. 952, decided in 1902,⁶ where the court said: "The acts of defendant's commissioners, under the rapid transit act, can not be construed to confer upon complainant any right or authority to construct an underground railroad specifically mentioned in the act. By the provisions of the rapid transit act, the privilege and franchise is to be sold at public auction to a corporation organized and existing under that act. The averred unconstitutionality of the Rapid Transit Act and the invalidity of the contract entered into by the defendants for the many reasons assigned in

⁶ This decision was sustained on appeal by the Supreme Court of the United States in 193 U. S. 416, 48 L. ed. 733, 24 Sup. Ct. 494.

the bill seem to be sufficiently answered by the decision of the court of appeals of the state of New York in *Sun Printing & Publishing Assn. v. City of New York*, 152 N. Y. 257, 46 N. E. 499, 37 L. R. A. 788. The constitutionality of the Rapid Transit Act is there established. The decision, being that of the highest tribunal of the state, is controlling upon this court.⁷ It falls within the general rule that the construction of the state courts of last resort of state constitutions and statutes will ordinarily be accepted by the courts of the United States as controlling. * * * As before stated, the act in terms authorizes the rapid transit board to contract 'with any person, firm or corporation which in the opinion of the board shall be best qualified to fulfill and carry out such contract for the construction of such road or roads upon the routes and in accordance with the plans and specifications so adopted, for such sum or sums of money, to be raised and paid out of the treasury of said city, as hereinafter provided, and on such terms and conditions not inconsistent with the aforesaid plans and specifications as said board shall determine to be best for the public interest.' Section 34. No particular person, class of persons, or corporation is excluded from the privilege of contracting for the construction and operation of the proposed railroad. All may compete."

An interesting discussion of the policies of municipal ownership and commission control and their relation to each other is furnished in the course of the decision in the case of *Idaho Power & Light Co. v. Blomquist*, 26 Idaho 222, 141 Pac. 1083, Ann. Cas. 1916E, 282, where the court said: "The only practical difference between systems operated under the utilities act and municipal ownership is that under the former system the money or means is provided by a bond issue or mortgage by a private corporation and the employees are named by the corporation furnishing the money, where under the latter the money is furnished and the employees named by the municipality. The control of a city council over municipal works is perhaps a little more complete than that of the commission over the utility under the present law. The state having taken away the rights of such corporations to fix their own rates, and having assumed supervisory power over the service in every material particular, it ought to provide some sort of a safeguard for those who furnish the money to construct the system, and the state has attempted to

⁷ *Adams Express Co. v. Ohio State Auditor*, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. 683.

meet this situation by providing that the utility already in the field shall have that field unless public necessity and convenience require an additional utility, and as to whether the public convenience and necessity require an additional utility is an administrative matter, left with the commission to ascertain and determine under supervisory power of the court."

The attitude of the court on the constitutional power of cities to enter upon the policy of municipal ownership is clearly indicated in the case of *Roettinger v. Cincinnati*, 16 Ohio App. 273: "Since the adoption of the constitution in 1912 the legislature has not had power to legislate with reference to the acquisition, ownership or operation of a public utility by a municipal corporation. It can neither grant nor deny the municipality that authority. The authority of the legislature to enact laws with reference to municipally-owned public utilities must be found in some other provision of the constitution."

A further discussion of the relation of state commissioners to the policy of municipal ownership is furnished in the case of *Springfield Gas &c. Co. v. Springfield, Illinois*, 257 U. S. 66, 66 L. ed. 131, 42 Sup. Ct. 24, where the court said: "The Public Utilities Act and the Municipal Ownership Act were enacted by the state of Illinois within a few days of each other, and, according to the Supreme Court of the state, as part of a single plan. The former excepts municipal corporations from its requirements, and the latter allows cities to go into this business among others, and to fix the rates, which in the plaintiff's case, are subject to the approval of the state public utilities commission. * * * But we agree with the Supreme Court of the state that the difference between the two types of corporation warrants the different treatment that they have received. * * * But a city council has no such interest in the city's electric plant as to make it incompetent to fix the rates. Whatever the value of the distinction between the private and public functions of the municipality, the duty of its governing board in this respect, as we have said, is public and narrowly fixed by the act."

That cities may take out liability as well as fire insurance to cover their risks is decided in the case of *Travelers Ins. Co. v. Wadsworth*, 109 Ohio St. 440, 142 N. E. 900, 33 A. L. R. 711, as follows: "The controlling question in this case is whether a village in the state of Ohio has the power, through its board of trustees of public affairs, to contract with an insurance company to insure itself against liability to members of the public on account of injuries or death caused by the maintenance and operation of

a municipal electric light and power plant and lines. * * * When a municipality is engaged in operating a municipal plant, under an authority granted by the general law, it acts in a business capacity, and stands upon the same footing as a private individual or business corporation similarly situated. Pond, Public Utilities, section 11; 4 McQuillin on Municipal Corporations, section 1801; 3 Dillon on Municipal Corporations (5th ed.), section 1301. * * * What reasonable distinction from the standpoint of economy, can be drawn between fire and liability insurance? Damage from both forms of misfortune very often occurs. In one form of insurance protection to the works is given; in the other, protection to the utility itself, including the business. In each case, procuring insurance appears a wise means of protection against such loss. Such protection would be exercised by an ordinary business man."

That the favorable attitude of the courts toward the policy of municipal ownership continues even after the creation of public utilities commissions is indicated in the case of *Holyoke v. Smith*, 75 Colo. 286, 226 Pac. 158, where the court said: "The operation of the electric light plant by the town of Holyoke is the performance of a municipal function, specifically authorized by statute. Section 8987, C. L. 1921. The evils to be avoided being such as have been * * * mentioned, we should, in applying this provision, give it a broad and reasonable, rather than a technical meaning, so as to accomplish its evident purpose. * * * On principle it would seem entirely unnecessary to give a commission authority to regulate the rates of a municipally owned utility. The only parties to be affected by the rates are the municipality and its citizens, and, since the municipal government is chosen by the people, they need no protection by an outside body. If the rates for electric light or power are not satisfactory to a majority of the citizens, they can easily effect a change, either at a regular election, or by the exercise of the right of recall."

In *Boston, Massachusetts v. Jackson*, 260 U. S. 309, 67 L. ed. 274, 43 Sup. Ct. 129, Chief Justice Taft upheld the Supreme Judicial Court of Massachusetts in sustaining the statutory authority vesting in the city of Boston the power to lease and operate the Boston Elevated Railway Company as being a municipal purpose for which taxes might be levied. In the course of the opinion the Chief Justice said: "We are relieved from full or detailed consideration of these grounds urged for reversal by the satisfactory opinion of the Supreme Judicial Court in this case. *Boston v. Treasurer*, 237 Mass. 403, 130 N. E. 390. What the

commonwealth did was to help the people of the towns which the railway served when the railway's finances threatened its collapse, by taking over the lease of the railway company for a valuable consideration. There is no restriction upon the power of the railway company to assign the lease if the company had the corporate power, and that, if it did not exist before, was supplied by the act itself. The law provided for keeping the property in good repair and the payment of the rentals due the city. There was nothing in the contract of assignment which, in the slightest degree, impaired the obligation of the company to the city under the lease. Indeed, it secured the performance of those obligations. * * * If the constitution and laws of Massachusetts authorize the commonwealth to operate a railway company for the public benefit, there is nothing in the Fourteenth Amendment to prevent. Nor is there anything in it preventing the state from using the trustees as agents to operate the railway, and in such operation to determine the needed expenditures to comply with the obligations of the lease or the requirements of adequate public service. This is delegating to proper agents the decision of a proper administrative policy in the management of a state enterprise and the ascertainment of facts peculiarly within their field of authorized action."

§ 875. **Public charitable trusts.**—Where the ordinance granting a franchise to own and operate a utility, the articles of incorporation of the company, and the stock subscriptions all provide that the stock of the company should be issued to trustees, and that when the indebtedness of the company is fully paid and the stockholders have received an amount equal to that paid for the stock together with dividends of ten per cent per annum, the officers of the company shall transfer the property of the company to the municipality, which shall then have the entire ownership of the plant, the court held that a public charitable trust was thereby created, according to the terms of which the city had the right to become the owner of the plant, free and clear of all claims of stockholders or subscribers to stock, after payment had been made to them as above-stated. Construing the franchise providing for the municipal ownership of the plant after the rights of certificate holders or stockholders had been satisfied, the court indicated that this arrangement did not constitute a purchase by the municipality, but that the plant became the property of the municipality by virtue of a public charitable trust, which was created by the franchise, articles of incorporation and subscriptions for stock, all as provided for at the incep-

tion of the company; and that the property rights in the municipality were not changed by the surrender of its franchise by the company in exchange for an indeterminate permit from the state. In upholding this plan of municipal ownership, which seems unique to Indianapolis, the courts again indicated their attitude toward the policy of municipal ownership. This very interesting principle, and the plan under which it was developed and sustained to fruition is established and discussed in part as follows in the case of *Todd v. Citizens Gas Co.*, 46 Fed. (2d) 855, where the court said: "The Citizens' Company and its franchise were the product of a movement for the protection of the public against what had happened in the Quinby litigation. * * * After the city's right to purchase was sustained, the Citizens' Gas Company was organized, and the grantees of the franchise of August 25, 1905, assigned it to the company. The articles of incorporation contained the provisions required in the ordinance. In the subscriptions to the capital stock of the corporation, the subscribers agreed that the stock should be issued to trustees as provided in the articles of incorporation; and that, when the indebtedness of the company should be fully paid, and the subscribers should have received an amount equal to the amount by them subscribed and paid, with dividends equal to ten per cent per annum, then the trustees and directors should execute proper instruments transferring all the property of the company to the city; and that thereupon the interest of the stockholders in the company and all its property should be canceled, released, and extinguished. * * * In 1913 Indiana enacted a law (known as the Shively-Spencer Act) creating a public service commission, through which the regulatory power of the state over public utilities was to be exercised. 3 Burns' R. S. 1926, p. 1238. * * * In section 1 of the act an indeterminate permit is defined as follows: 'The term "indeterminate permit," as used in this act, shall mean and include every grant, directly or indirectly, from the state to any corporation * * * of power, right or privilege to own, operate, manage or control any plant or equipment * * * within this state, for the production, transmission, delivery or furnishing of heat, light, water or power, either directly or indirectly, to or for the public * * * which shall continue in force until such time as the municipality shall exercise its option to purchase, as provided in this act, or until it shall be otherwise terminated according to law.' 3 Burns R. S. section 12672, p. 1240. * * * On August 27, 1921, pursuant to resolutions of the trustees, assuming to act for the stockholders, and of the board of directors, the company executed and filed

with the public service commission and the city, as required by law, a declaration of surrender. * * *

"There was no franchise, license, or permit to them. There was to be no grant, until the corporation, to be organized by them, by declaration in its charter, should fix the rights of its stockholders and of the city in the property to be acquired to carry out the purpose of the grant. Thus the existence of the grant was removed from the field of mere contract relations between grantor and grantee, and made dependent upon the creation of a corporation in whose organic law the rights of the city were embedded. It is as clear as it is possible for words to make it that there should be no grant of rights in the streets except to a corporation which, by the voluntary act of all its stockholders, should declare, in advance, that the property acquired with the money contributed by them should be held under the obligation of the corporation to convey it to the city when the contribution with interest had been returned, and that, upon the return of the contributions, as provided, the rights of the stockholders should be extinguished. * * * The subscribers to the stock intended in our opinion, that the property acquired by the money paid in by them, should be held by the company, as a trustee, for the benefit of the inhabitants of Indianapolis, subject to a charge in favor of the certificate holders to the extent of their investment, to be conveyed to the city as successor upon the extinguishment of the charge. * * * Municipal corporations at the time of these transactions were authorized by the law of Indiana to purchase, construct, and operate gas plants, and the property so acquired was held as the property of the municipal corporation for public use, and charged with a public trust, of which the inhabitants of the city were the beneficiaries. *Lake County Water & Light Co. et al. v. Walsh*, 160 Ind. 32, 65 N. E. 530, 98 Am. St. 264. We think, therefore, that under Indiana law the establishment and operation of a gas plant was a proper object of a public charitable trust. In our opinion, nothing was decided in *Consumers' Gas Trust Co. v. Quinby* (C. C. A. 7), 137 Fed. 882, which is inconsistent with this view. * * * The municipality, by means of such conditions, may impose obligations upon the company which it would have no power or authority to impose under its general charter powers, and, if the company accepts the grant, it is bound by the conditions, and is estopped to question their validity. * * * The Indiana statutes, in our opinion, do not require such an authorization of the conveyance which the directors of the company are commanded by the arti-

cles of incorporation to make. It is not a purchase by the city. The acts of the city in connection with the operation of the plant, after the directors have performed their charter duties, are matters with which the certificate holders are not concerned. When they are paid off, as provided, their interest is at an end. * * * Appellants invoke the Indiana Public Utility Act, of 1913, and assert that the surrender in 1921 under section 101 of the act operated to end all rights and obligations under the franchise, and therefore to relieve the directors from compliance with the provisions of the company's charter requiring the conveyance to the city. The provision of the Indiana law was taken from the Wisconsin statutes, and the Supreme Court of Indiana has recognized the decisions of the Wisconsin Supreme Court as persuasive in its construction. *Greensburg Water Co. v. Lewis*, 189 Ind. 439, 128 N. E. 103, 107. * * * We find nothing in the language of the statute or in the decisions of Wisconsin prior to its enactment which would indicate an intention on the part of the legislature that a public utility, by surrendering its franchise, might thereby destroy vested property rights which it had voluntarily created, and release itself from obligations respecting those rights which it had voluntarily undertaken before the existence of the franchise and as an inducement to the municipality to make the grant of the privilege. * * * The question here is, What has the legislature done? It has authorized the giving up of one privilege from the state and the acceptance of another in lieu thereof. It has not required the utility, as a condition of the exchange, to give up any of its property rights; and it is equally clear that it has not authorized the utility, by the surrender, to expand its property rights, at the expense of the public. The obligations from which the utility frees itself upon the assumption of the new obligations are those 'relating to the privilege feature.'"

CHAPTER 31

MUNICIPAL BUREAUS OR COMMISSIONS

| Section | Section |
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§ 880. **Strict enforcement of franchise and contract rights essential.**—Consistent and intelligent enforcement of franchise rights and of the power to regulate and control the municipal public utility is of equal importance to securing the proper franchise provisions and the necessary statutory authority to permit the municipality to regulate and control the municipal public utility. The fearless and persistent enforcement by the municipality of its rights in securing adequate and complete service from the municipal public utility at a fair and uniform rate is just as essential, if not even more necessary, than providing the necessary power and authority for giving the municipality the right to require such service for itself and its inhabitants and to control the rates of the municipal public utility. The strict and impartial enforcement of the law and of the franchise or contract rights available to the municipality is essentially necessary if it is to receive satisfactory service at a fair uniform rate.

§ 881. **Means of enforcing rights—Information necessary.**—The methods or means by which such powers may be enforced and the rights conferred thereby secured are by legal proceed-

ings, legislative enactment, action by the people themselves, or by public utility commissions. Regardless of the means employed it is always first necessary to have complete and accurate information as to the power of the municipality to regulate the giving of the service and the rates by virtue of its franchise or contract rights or statutory provisions; and next to determine the extent and the necessity of the investment of the municipal public utility to give the desired service as well as the expense of its maintenance and operation, the schedule of rates and other rules and regulations for furnishing the service and all matters connected with the operation of the plant and the administration of the affairs of the municipal public utility, including a complete understanding of the system of accounting and of all merger or consolidation agreements; and finally a uniform scientific system of accounting is essential as the basis for determining the amount of the investment and of a reasonable capitalization and rate of return for it.

§ 882. Enforcement by legal proceedings no longer adequate. —The enforcement of all these rights for the purpose of securing the service to which the municipality and its inhabitants are entitled at a fair uniform rate by a resort to legal proceedings has until recently been practically the only efficient method available. Although the relief secured in this way has generally been efficient it has necessarily been attended by large expenditures of money, and in many cases final relief has been very much delayed while in the meantime all parties interested have been subjected to much inconvenience and expense. Relief at the hands of the courts is in a sense only retroactive and personal, being limited to past transactions and to the parties to the action, and is not comprehensive of all parties interested. The nature and extent of the investigation necessary to the decision of matters connected with the giving of satisfactory service at the proper rate makes relief at the hands of the court practically impossible because of the large and constantly increasing number of such cases arising and of the already overcrowded dockets of our courts.

Adequate regulation must anticipate future conditions and provide present and prospective relief rather than the adjustment of the rights of parties based on past transactions. The expense of time and money necessary to secure relief in such cases at the hands of the courts is prohibitive to most consumers of such service whose interest alone does not justify their expenditure of the necessary time and money to secure the relief to which they

are entitled. This method is extravagant to the municipal public utility itself as well as to the customer, and it is now generally conceded by all concerned to be inadequate for their needs.

Indeed the attitude of our courts is so favorable to commission control that the courts refuse to substitute their judgment for that of the commission. As the court expressed this principle in the case of *United Fuel Gas Co. v. Public Service Comm.*, 73 W. Va. 571, 80 S. E. 931: "But we can not construe the statute as intended to give us the power and authority to substitute our judgment for that of the commission, in a matter purely legislative or administrative. Such a construction would practically emasculate the statute and rob it and the commission of their proper authority and jurisdiction. The salaries which the statute attaches to the office of the commissioners, and the nature of the subjects to be dealt with by them, all imply that only persons of the requisite qualifications should be appointed, and that after appointment they should by investigation and study become further qualified by learning and experience, indeed should become experts upon all subjects and business coming within their jurisdiction. Is it to be presumed then that the legislature intended to invest in this court jurisdiction on review by original or other process to substitute its judgment for that of the commission? We can not so hold. The court might, perhaps, differ from the commission on the same state of facts, acting with its limited knowledge of the subject, as to what would be right and just in a particular case, but would that justify suspension or nullification of the order of the commission? The statute ought not to be so construed."

To a like effect that commission control is now generally regarded as essential, the court in the case of *State v. Sunset Tel. & T. Co.*, 86 Wash. 309, 150 Pac. 427, L. R. A. 1917F, 1178, P. U. R. 1915F, 947, said: "In these days ample and effectual regulation and control of all such public utilities obtain by and through the state's mandatory agencies, both as to economy and as to conveniences. The old clamor for competition and against monopoly in public utilities of almost every character has largely ceased, and the fundamental reasons therefor, in general, have vanished, under public regulation. Monopoly of service in public utilities no longer terrifies. Economy of service and of cost to the public, together with the highest kind of efficiency and adaptability to use, is now demanded and enforced."

§ 883. **Relief by legislative enactment aside from commissions.**—Relief by legislative enactment, as distinguished from

that delegated by the state to the municipality or a public utility commission, can not in its very nature be satisfactory or sufficient because of the infrequency of the sessions of the legislature and of the increasing demands upon the limited time available for its action. Nor can such a method suffice for the further reason that general legislation with reference to municipal public utilities, involving so many details and having so many circumstances peculiar to each particular case, can not fairly or completely regulate the matter. The details of administration and the varying conditions prevailing in different localities render general legislation on such matters entirely insufficient, necessitating their delegation to local authority or to a commission which can always entertain a complaint or petition and grant summary relief; for as the court in the case of *Capital City Gas Co. v. Des Moines, Iowa*, 72 Fed. 818, said: "Necessarily, and because of the great variety and large number of differing circumstances which enter into the local situations of the cities in the state, a general statute, fixing the price of gas, could scarcely be so drawn as satisfactorily to adapt itself to each city; and therefore, for convenience of exercise of power to fix rates, as well, perhaps, as to permit the rates to be fixed with greater flexibility, and with more special reference to what local situations might require, the general assembly delegated this power to fix these rates to the several municipal corporations, to be exercised through their respective city councils. That this delegation was a valid exercise of legislative power is conceded by council herein."

§ 884. **Popular control by public generally impracticable.**—That general legislation is entirely inadequate as a method of regulating and controlling municipal public utilities is evidenced by the common practice of delegating a constantly increasing portion of these affairs to the particular municipality or to a specially constituted commission created for that purpose and equipped with the necessary technical knowledge and comparative information to make a prompt and accurate investigation and disposition of the questions as they arise.

That the people themselves as citizens of the state or inhabitants of the particular municipality will not give the matter the necessary attention, and because of their lack of organization and of technical information and practical experience, that they could not attend to it satisfactorily, if they would, is proved conclusively by experience and common observation. Responsibility of this sort must be personalized in order to get the necessary attention and the business of the modern municipal public utility is

entirely too elaborate and technical in its nature for every one to investigate and understand sufficiently to insure accuracy and fairness in the disposition of the matter. In the very nature of the questions involved and in the light of past experience it must be self-evident that popular control of municipal public utilities by all who may be interested in either receiving or furnishing the service can not succeed but that the matter must be placed in the hands of trained, unbiased experts of the same ability and integrity as those in charge of the municipal public utility itself.

§ 885. **Public utilities commissions adequate and practically necessary.**—The public utilities commission is the latest and apparently the ultimate form of securing adequate and intelligent regulation and is attended with the least possible expenditure of money and time necessary to secure the desired results. A public utilities commission, established by the state or a municipal commission or bureau created pursuant to authority conferred upon the municipality by the state for that purpose, is a permanent administrative body of trained experts whose services are always available for the purpose of investigating and adjusting the conflicting rights and liabilities that are necessarily constantly arising between the opposing parties, involved in furnishing and using any municipal public utility service. The members of such a commission are not only specially trained for this service but they give it their exclusive attention, and the information secured in connection with the investigations and adjustments made in the course of a few years furnishes the necessary technical data in detail which, when properly classified by the commission, constitutes the basis for the investigation and adjustment of any question arising in any particular municipal public utility at a comparatively nominal expense.

The jurisdiction of state commissions as to subject-matter is clearly indicated in the case of *State Public Utilities Comm. v. Bethany Mutual Tel. Co.*, 270 Ill. 183, 110 N. E. 334, Ann. Cas. 1917B, 495, P. U. R. 1916A, 997, where the court said: "The act creating the commission, defining its powers and giving it general supervision of public utilities, provides that the term 'public utility' includes every corporation, company, or association, joint-stock company or association, firm, partnership, or individual, that may own, control, operate, or manage directly or indirectly for public use any plant, equipment, or property used or to be used for or in connection with the transmission of telephone messages between points within this state. The jurisdiction of the commission is by the terms of the act confined to con-

trol and supervision of owners and operators of property devoted to a public use. The purpose of the act is to bring under control by the public, for the common good, property applied to a public use in which the public has an interest. The owner of such property must submit to be controlled by the public to the extent of its interest as long as such public use is maintained. *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *People ex rel. Cairo Tel. Co. v. Western U. Tel. Co.*, 166 Ill. 15, 46 N. E. 731, 36 L. R. A. 637; *Inter-Ocean Pub. Co. v. Associated Press*, 184 Ill. 438, 56 N. E. 822, 48 L. R. A. 568, 75 Am. St. 184. To constitute a public use all persons must have an equal right to the use, and it must be in common, upon the same terms, however few the number who avail themselves of it. It is not essential to a public use that its benefits should be received by the whole public, or even a large part of it, but they must not be confined to specified, privileged persons. *People ex rel. Scott v. Ricketts*, 248 Ill. 428, 94 N. E. 71. The words, 'public use,' mean of or belonging to the people at large, open to all the people to the extent that its capacity may admit of the public use. *State Public Utilities Commission v. Monarch Refrigerating Co.*, 267 Ill. 528, 108 N. E. 716, Ann. Cas. 1916A, 528, P. U. R. 1915D, 119. The use must concern the public as distinguished from an individual or any particular number of individuals, but the use and enjoyment of the utility need not extend to the whole public or any political subdivision. It may be confined to a particular district and still be public."

The comprehensive scope and practical advantage of state public utilities commissions were clearly set out in the case of *Arlington Board of Survey v. Bay State St. R. Co.*, 224 Mass. 463, 113 N. E. 273, 5 A. L. R. 24, where the court, in discussing the policy of this universal system of control, said: "The question, therefore, is reduced to one of statutory interpretation. It is whether the general control over fares has been vested in the public service commission by St. 1913, c. 784. That act marked a radical change in the policy of the legislature in the regulation of street railways. It conferred upon the public service commission far greater powers over the operation and accommodations to be provided by such common carriers than had been vested in any board by earlier acts. Summarily stated, it clothed the commission with full power to require safe, reasonable and adequate service to the public from all common carriers. The authority of the commission as to supervision and regulation in other respects is ample. It is manifest that such broad powers justly can not be exercised to the extent conferred by the words used except

when joined either with equally full power to regulate charges, rates and fares, or with freedom of action by the carrier in these respects, so as to enable the carrier to receive a fair return for the service required. This power is expressly conferred by section 22, which after subjecting the rates and fares actually charged or demanded to their supervision, enacts that whenever the commission is of opinion 'that the rates, fares and charges or any of them chargeable by any such common carrier are insufficient to yield reasonable compensation for the service rendered and are unjust and unreasonable, the commission shall determine the just and reasonable rates, fares and charges to be charged and shall fix the same by order binding upon the carrier.' * * *

There is no room for the binding force of stipulations as to fares in original grants of locations by local boards in the face of these sweeping provisions. Such stipulations are extinguished so far as inconsistent with the terms of St. 1913, c. 784. The plain purpose of the legislature, in recognition of the fact that many street railways operate miles of tracks extending through numerous cities and towns, was to prescribe for the regulation of fares throughout the commonwealth by a single public board, which may be expected to act with a broad and unbiased view for the promotion of the common good of all the conflicting interests involved and not under the influence of purely local considerations. The statute is a legislative determination that it is unwise and inexpedient longer to permit the full development of interurban transportation by street railways to be hampered by conditions as to fares contained in locations granted by the public officers of different municipalities."

§ 886. **Relief summary, adequate and inexpensive.**—With the information, secured as the result of the investigations and adjustments made by the commission and classified, it is possible to make the proper disposition of any case promptly when it arises in the light of the information which the commission already has on hand or can secure at a relatively slight expense and much more expeditiously than by resort to the courts. It is a question of business administration rather than a judicial one whose adjustment requires not only accurate technical information but a definition and enforcement of the rights of the parties in a particular case as well as those in all similar ones arising any time thereafter in order that all the rights belonging respectively to each party may be secured promptly and impartially.

That relief by the control of state commissions should be adequate, efficient, and complete was well expressed in the case of

People v. McCall, 219 N. Y. 84, 113 N. E. 795, Ann. Cas. 1916E, 1042, P. U. R. 1917A, 553, as follows: "The public service commissions were created by the legislature to perform very important functions in the community, namely, to regulate the great public service corporations of the state in the conduct of their business, and compel those corporations adequately to discharge their duties to the public and not to exact therefor excessive charges. It was assumed, perhaps, by the legislature that the members of the public service commissions would acquire special knowledge of the matters intrusted to them by experience and study, and that when the plan of their creation was fully developed they would prove efficient instrumentalities for dealing with the complex problems presented by the activities of these great corporations. It was not intended that the courts should interfere with the commissions or review their determinations further than is necessary to keep them within the law and protect the constitutional rights of the corporations over which they were given control."

§ 887. **Matter of business administration by experts.**—The fact that a franchise is not self-enforcing and that statutory provisions for the regulation of municipal public utility service are not self-executing furnishes ample justification for a public utilities commission. Being a matter of business administration the commission which is composed of trained business experts along this particular line not only furnishes the best and most efficient method for regulating the business but also, by separating it from other municipal affairs and political considerations, thereby relieves it of the greatest practical difficulty which has generally attended the administration of such business matters by the ordinary municipal officer who is selected by a political party, and because of the manner of his selection and the short term of his service can not be or become an expert on the subject.

The practical business aspect of the matter of valuation for rate-making purposes which the commission was required to decide upon appeared in a very interesting situation in the case of Pacific Gas &c. Co. v. San Francisco, California, 265 U. S. 403, 68 L. ed. 1075, 44 Sup. Ct. 537, P. U. R. 1924D, 817, which the court disposed of as follows: "Obviously, under the theory accepted below, appellant worsened its situation for rate-making purposes when it reduced the cost of manufacturing gas. Introduction of successful patented inventions enabled the public authorities to lower the rate base and gather all the benefits. The operating plant, made capable of producing gas at smaller cost,

was declared less valuable than before. The result indicates error somewhere, either in theory or application of principle. Obsolescence of one or more stations, and perhaps other property theretofore of great value (possibly \$800,000) followed installation of the patents, but the remaining plant, plus the patents, gave better results. As an operating unit the new combination had greater value than the old; but the court below disregarded the demonstrated worth of the element which wrought this change. The obsolescence in question did not result from ordinary use and wear. Certainly it could not have been long anticipated,—the patents were of recent conception; to provide for it out of previous revenues was not imperative, if possible. Former consumers were not beneficiaries; only subsequent ones could be advantaged. Our concern is with confiscation. Rate making is no function of the courts; their duty is to inquire concerning results, and uphold the guaranties which inhibit the taking of private property for public use without just compensation under any guise. We may not, therefore, relegate appellant's claim for past services to the future consideration of the state commission, as the master suggests. After adopting the reduced costs of manufacture for estimating net returns, the court gave no proper valuation to the inventions which caused the reduction, and thereby permitted property to be taken without just compensation. The amount of money actually paid to the inventors was not the proper measure of worth. Experience had demonstrated a much higher one; and to obtain the benefit of their use appellant sacrificed much. Installation of the inventions necessitated new outlay of money and abandonment of property theretofore valuable,—both were necessary in order that the cost of manufacture might be reduced. If appellant's permissible profits depend upon the lowered costs, and it is denied adequate return upon property which made the reduction possible, or recompense for the obsolescence, successful efforts to improve the service will prove extremely disadvantageous to it."

§ 888. **Business of municipal public utilities and politics distinguished.**—With the business of municipal public utilities placed in the hands of such a nonpartisan permanent commission of capable men specially trained for rendering such service, these very important and extensive business interests, in which every inhabitant of the municipality as well as the municipality itself is vitally interested, would be separated from political matters and party politics which have been all too often controlled by and in the interest of those in charge of the municipal public

utilities. Whether other municipal affairs are matters of business rather than politics, there can be no question but that all matters of municipal public utilities are business questions and not political ones, which accordingly can only be properly disposed of in a business way and by men especially informed and experienced in such affairs, rather than by municipal officers selected by political parties for a short term of service. There is no more justification for expecting a satisfactory and efficient administration of municipal public utility affairs at the hands of municipal officers who are thus selected at such frequent intervals than would be the case in the affairs of any large business concern, for both alike require capable experienced men specially trained and permanently in charge of the regulation or administration of such concerns.

§ 889. **Concentration of power and responsibility.**—The most convenient and efficient method of regulating and controlling municipal public utilities service is by an administrative body having all the necessary power to regulate the service together with the duty and responsibility imposed by the grant of such power. The nature and extent of the power which such a commission or bureau has depends entirely upon the statutory provisions creating it, and while such power may be merely advisory the situation generally requires authority to dictate and enforce as well as to advise, if satisfactory results are to be obtained.

In defining the scope of state and city control and the ultimate power vested in the state, the court said in the case of *Trenton, New Jersey v. State of New Jersey*, 262 U. S. 182, 67 L. ed. 937, 43 Sup. Ct. 534, 29 A. L. R. 1471: "In the absence of state constitutional provisions safeguarding it to them, municipalities have no inherent right of self-government which is beyond the legislative control of the state. A municipality is merely a department of the state, and the state may withhold, grant, or withdraw powers and privileges, as it sees fit. However great or small its sphere of action, it remains the creature of the state, exercising and holding powers and privileges subject to the sovereign will. See *Barnes v. District of Columbia*, 91 U. S. 540, 544, 545, 23 L. ed. 440, 441. * * * The power of the state, unrestrained by the contract clause or the Fourteenth Amendment, over the rights and property of cities held and used for 'governmental purposes,' can not be questioned. In *Hunter v. Pittsburgh*, 207 U. S. 179, 52 L. ed. 151, 159, 160, 28 Sup. Ct. 40, supra, reference is made to the distinction between property owned by municipal corporations in their public and governmental capacity

and that owned by them in their private or proprietary capacity, and decisions of this court which mention that distinction are referred to. In none of these cases was any power, right, or property of a city or other political subdivision held to be protected by the contract clause or the Fourteenth Amendment. This court has never held that these subdivisions may invoke such restraints upon the power of the state. * * * The distinction between the municipality as an agent of the state for governmental purposes and as an organization to care for local needs in a private or proprietary capacity has been applied in various branches of the law of municipal corporations. The most numerous illustrations are found in cases involving the question of liability for negligent acts or omissions of its officers and agents."

§ 890. **Commission constitutional and entirely legal.**—That an administrative body in the form of a commission or bureau is constitutional and a practical business necessity has been fully recognized by all the courts which have been called upon to construe such statutory enactments, and in their decisions they have fully recognized the necessity for such administrative bodies.

Among the first of these decisions to conceive the necessity for such a method of regulating the modern municipal public utility service is the case of *Stone v. Farmers Loan &c. Co.*, 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. 334, 388, 1191, commonly known as the Railroad Commission cases, where the right to regulate the furnishing of such service and to fix the reasonable rate for it through a commission, created by the state for that purpose, is fully and frankly recognized and approved.

The same court in the case of *Reagan v. Farmers Loan &c. Co.*, 154 U. S. 362, 38 L. ed. 1014, 14 Sup. Ct. 1047, decided in 1894, supplementing the decision of this court in the Railroad Commission case spoke as follows: "Passing from the question of jurisdiction to the act itself, there can be no doubt of the general power of a state to regulate the fares and freights which may be charged and received by railroad or other carriers, and that this regulation can be carried on by means of a commission. Such a commission is merely an administrative board created by the state for carrying into effect the will of the state as expressed by its legislation.¹ * * * No valid objection, therefore, can be made on account of the general features of this act; those by

¹ *Stone v. Farmers Loan &c. Co.*, 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. 334, 388, 1191; *Board of Education v. Alton Water Co.*, 314 Ill. 366, 145 N. E. 683.

which the state has created the railroad commission and entrusted it with the duty of prescribing rates of fares and freights as well as other regulations for the management of the railroads of the state. * * * It is doubtless true, as a general proposition, that the formation of a tariff of charges for the transportation by a common carrier of persons or property is a legislative or administrative rather than a judicial function. Yet it has always been recognized that, if a carrier attempted to charge a shipper an unreasonable sum, the courts had jurisdiction to inquire into that matter and to award to the shipper any amount exacted from him in excess of a reasonable rate, and also in a reverse case to render judgment in favor of the carrier for the amount found to be a reasonable charge. The province of the courts is not changed, nor the limit of judicial inquiry altered, because the legislature instead of the carrier prescribes the rates. The courts are not authorized to revise or change the body of rates imposed by a legislature or a commission; they do not determine whether one rate is preferable to another, or what under all circumstances would be fair and reasonable as between the carriers and the shippers; they do not engage in any mere administrative work; but still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to rights of property, and if found so to be, to restrain its operation."

The commission on a proper finding of facts may regulate and fix rates and require service which will supplement and supplant existing rates and regulations. This principle defining the jurisdiction of state commissions and describing their powers is clearly set out by Chief Justice Taft in the case of *Wichita R. & C. Co. v. Public Utilities Comm.*, 260 U. S. 48, 67 L. ed. 124, 43 Sup. Ct. 51, as follows: "The power is expressly made to depend on the condition that, after full hearing and investigation, the commission shall find existing rates to be unjust, unreasonable, unjustly discriminatory, or unduly preferential. We conclude that a valid order of the commission under the act must contain a finding of fact after hearing and investigation, upon which the order is founded, and that, for lack of such a finding, the order in this case was void. This conclusion accords with the construction put upon similar statutes in other states. *State Public Utilities Commission ex rel. Springfield v. Springfield Gas & E. Co.*, 291 Ill. 209, 125 N. E. 891, P. U. R. 1920C, 640; *State Public Utilities Co. v. Baltimore & O. S. W. R. Co.*, 281 Ill. 405, 118 N. E. 81,

P. U. R. 1918B, 655. Moreover, it accords with general principles of constitutional government. The maxim that a legislature may not delegate legislative power has some qualifications, as in the creation of municipalities, and also in the creation of administrative boards to apply to the myriad details of rate schedules the regulatory police power of the state. The latter qualification is made necessary in order that the legislative power may be effectively exercised. In creating such an administrative agency, the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined, and show a substantial compliance therewith, to give validity to its action. When, therefore, such an administrative agency is required, as a condition precedent to an order, to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective."

§ 891. Commission a practical business necessity.—The necessity for such a commission in order to secure the proper regulation and control of municipal public utilities is frankly recognized and accurately expressed in the very practical decision of *Des Moines Gas Co. v. Des Moines, Iowa*, 199 Fed. 204,² decided in 1912, where the court said: "This litigation has cost both gas company and city extravagantly large sums, most of which can not be taxed as costs, nor recovered back by the party successful in the end. Much of this kind of litigation, and practically all of the expense, would be avoided if Iowa, like so many of the other, including some neighboring, states, had an impartial and city non-resident commission or tribunal, with power to fix these rates at a public hearing, all interested parties present, with the tribunal selecting its own engineers, auditors, and accountants. Too often we have selfish, partisan, prejudiced, and unreliable experts engaged for weeks at a time, at \$100 or more and expenses per day, exaggerating their importance, and making the successful party in fact a loser. With all of our boasted advancement, Iowa is a laggard in this matter, and will continue as such until these rate makings are taken from the power of city councils. Appeals to the courts will seldom be taken from the findings of such a tribunal."

² Modified in *Des Moines Gas Co. v. Des Moines, Iowa*, 238 U. S. 153, 59 L. ed. 1244, 35 Sup. Ct. 811.

That motor vehicles operating as common carriers are properly subject to regulation by state commissions is decided in the case of *Rapid R. Co. v. Michigan Public Utilities Comm.*, 225 Mich. 425, 196 N. W. 518, P. U. R. 1924B, 585, as follows: "Our attention is called to the holdings of the courts and commissions in other states. In New York, by chapter 667 of the Laws of 1915, persons or corporations owning or operating a 'bus line or motor vehicle line' are included in the term 'common carrier' as used in the Public Service Commissions Law, and under that law all such carriers must procure a certificate of convenience and necessity before engaging in the business. Substantially similar provisions are found in the Illinois Utilities Act (Hurd's Revised Statutes 1919, c. 111a). Under our act (209) persons so engaged are deemed to be common carriers, and subject to the applicable provisions of the law relating thereto. * * * This is an age of evolution in the transportation business. Steam railroad service greatly reduced the earnings of the vessels carrying passengers and freight, and put the stage coach out of business. Electric cars have much affected the business of the steam roads between certain points. The use of motor vehicles will doubtless decrease the earnings of the electric roads. If it be desirable to clothe the commission with the power to prevent such competition by refusing to permit motor vehicles to operate, when the service rendered by the steam and electric roads is adequate to the needs and convenience of the public, we think the legislature should so provide in no uncertain language."

The attitude of the court and all parties in interest on this principle of commission control is discussed in the case of *State v. Kansas Postal-Telegraph-Cable Co.*, 96 Kans. 298, 150 Pac. 544, as follows: "We recognize that officers of public service corporations have viewed with great misgiving the extension of governmental power over their business which has come about in recent years. But this extension of governmental power, this public supervision by state and interstate commissions has probably come to stay. Public service companies will have to reorder their affairs accordingly. These official commissions have entered a new field of governmental activity. With time and experience they will take a broad and rational view of their duties and responsibilities. In time the public service companies will learn to trust these commissions as fully as they do the courts. Indeed, these commissions are equipped for the expeditious dispatch of business in a manner which will be of great service to the public utility companies, and will supply a field which courts never were designed to fill."

The nature of the duties of the commission and the extent of its power are well defined in the case of *State v. Lewis*, 187 Ind. 564, 120 N. E. 129, as follows: "Contracts as are here in question, although entered into by the city, are nevertheless contracts of the state on the one side, and the utility on the other. * * * In the present case the fixing of the rate of fare was not left to the municipality, as is sometimes done. The state, in this respect, acted in the interest of the public, and to the utility it was a condition for the privilege of using a portion of its highway system. Upon the facts before us we conclude that the city, in incorporating the rate schedule in the franchise in question, acted as the agent of the state and of its authority in this respect the public, as well as the city must take notice. The city was not a necessary party. In coming to this conclusion we were not unmindful of the rule applicable to contracts made for the benefit of third persons. That rule has no application to this class of cases. * * * The public service commission is not a legislature, although when exercising its rate-making power it is performing a legislative act. It is not a court, yet in certain matters its acts, in a sense, are quasi-judicial. More strictly speaking, it is an administrative body, charged with ministerial and in some instances with legislative duties (4 R. C. L. 623), or, in other words, it is a legislative agency, assumed to be qualified by knowledge and experience to regulate the public utilities of the state with reasonable fairness and substantial justice, not only to the public, but the utility as well. * * * The doctrine is elementary that legislative action, if possible, should be so construed as to give effect and meaning to all its provisions. The 1913 public utility law introduced a new departure in the handling of public utilities, and was effective to withdraw from the municipalities certain powers theretofore exercised by them. The purpose of this law was, in part, to correct through an unprejudiced tribunal certain unfair action against the people by the utility, or by the people against the utility, and, in so far as possible, fix a uniform procedure throughout the state for all concerned."

§ 892. **Relief at hands of courts practically impossible.**—That the courts can not give adequate relief in the increasing number of cases involving so many details of business administration in connection with furnishing municipal public utility service, and that the commission is absolutely essential and much better fitted for giving the relief, are indicated in the case of *Saratoga Springs v. Saratoga Gas &c. Co.*, 191 N. Y. 123, 83 N. E. 693, 18 L. R. A. (N. S.) 713, 14 Ann. Cas. 606, decided in 1908, where the court

said: "That the most appropriate method (speaking from a practical, not necessarily constitutional, point of view) is the creation of a commission or body of experts to determine the particular rates, has been said several times in the opinions rendered by the Supreme Court of the United States in the various Railroad Commission cases and in those of state courts. While no consideration of convenience or of supposed necessity would justify us in ignoring any constitutional mandate or limitation, it must be remembered that we have no express constitutional provision on the subject, and that it is sought to condemn the legislation before us solely by extending the principle that the legislature can not delegate legislative powers, a principle which, though unquestionably true, is, as we have seen, true only within limits to a point that would render efficient legislation on the subject impracticable. It can not be said, to use the language of Justice Harlan, that in any real sense the legislature has delegated its power to the commission. The statute is complete. The legislature, not the commission, has enacted that there shall be maximum rates for the charges of the gas and electric light companies, and that light shall be furnished to consumers at those rates, and has provided the penalty for extorting greater charges for service. What is intrusted to the commission is the duty of investigating the facts, and, after a public hearing, of ascertaining and determining what is a reasonable maximum rate. I can not see how the duty intrusted to the commission in this case differs in principle from that imposed on the President to determine that duties were reciprocally unequal or on the secretary of the treasury to determine what was inferior tea."

The matter of fixing rates for public utility service, which is now generally done by the filing of a schedule of rates with the state commission for its consideration, or the making and preparation of such a schedule by the commission itself, is an administrative or legislative function and not a judicial one. Rates which are lawful and proper are final and may not be changed or modified by the courts or any reviewing or supervising body. Only rates which are unfair, unreasonable or discriminatory, may be reviewed by the courts, by which they may be set aside for any of these reasons; but the courts can not fix rates, because it is not in their power to do so, nor are they qualified or provided with the necessary technical, expert information and advice to fix and define rates. This, being a legislative or administrative duty, can only be performed by officers or commissions endowed with these powers. It is quite evident, therefore, that in most

cases commissions to regulate and fix rates are necessary, and experience indicates that in practically all cases they are advisable and preferable. In reviewing rate cases for the purpose of determining their propriety and legality by the courts, the necessity for furnishing them with the necessary technical data and expert information and advice is clearly evident, although in many cases, unfortunately as a matter-of-fact, this is not done, especially in the interest of the public, and the courts are accordingly often seriously handicapped in performing their duties in rate cases. This function belongs to public officials, commissions or some representative of the public interests, and in all too many cases, it is not fully and properly performed. It is an extreme and vital necessity that those persons representing the public interests should be equally as capable as the representatives of the utility, and the frequent failure to meet this requirement and to fully discharge this duty is naturally reflected in the decision of rate cases. The necessity for efficient commission control and cooperation with the courts has become apparent and is now generally recognized in practically all jurisdictions, for all the states, save one perhaps, have commissions, although their efficiency varies with the statutory provisions creating them and with the ability and integrity of their personnel. These principles and their proper application in practice are recognized and discussed in all such cases, one of which is found in the decision of the case of *Knotts v. Nollen*, 206 Iowa 261, 218 N. W. 563, where the court said: "Rate making is a legislative or administrative, not a judicial, function. A rate fixed by the proper administrative authority, while it may be annulled if in violation of legal rights, is not subject to readjustment or correction by the court as a reviewing or supervisory body. When it is found that the rate is not unlawful, the duty and authority of the court ceases. *Cedar Rapids Gaslight Co. v. Cedar Rapids*, 144 Iowa 426, 120 N. W. 966, 48 L. R. A. (N. S.) 1025, 138 Am. St. 299. The presumption is in favor of the rate or regulation, and the court may interfere only in a clear case of violation of legal rights. *Id.* The water plant in controversy is municipally owned, and is operated by the defendants as the board of water-works trustees of the city. The city in its ownership and operation of a public utility is acting in its corporate, and not its public or governmental, capacity. The municipal owner, like a public service corporation, must furnish its service impartially to all who are similarly situated. * * * Discrimination, to be unlawful, must be unjust and unreasonable. It must operate to the

unjust advantage of one and consequent oppression or disadvantage to another. * * *

"The question is whether there are reasonable grounds for the classification, or whether the classification is arbitrary, discriminatory, and unjust or oppressive. The theory of the defendants is that the water furnished to an apartment house is in some form, whether ostensibly so or not, charged ultimately to the occupying families, and that the consumers are not the proprietor, but the families; that to classify an apartment house as a quantity consumer is therefore to discriminate in favor of families occupying an apartment house and against those occupying disconnected dwellings. To this it may be added that the city has no control of the water after it passes the meter or of the charges that may be made for it. * * * Water is supplied to hotels and office buildings largely for individual and a more limited and intermittent consumption. * * * We are of the opinion that the defendants, in their classification of apartment houses, are not acting so arbitrarily and unjustly, and are not so unreasonably discriminating, to the disadvantage of apartment house owners or the advantage of proprietors of hotels and office buildings, as to entitle the plaintiffs to the intervention of the courts."

§ 893. Reasonable rates required at common law and by statute.—The statute provides that the commission shall fix the rate within the limits prescribed by law. This includes both statute and common law. There may have been companies which had franchises immune from invasion by which they were authorized to charge specific rates. The common law prescribes the rule that the rate shall be reasonable, and I think, even without special mention, the statute would necessarily imply the same limitation. But it is said that, granting this, 'reasonable' is really no standard, but a mere generality. Again, we are of a different opinion. Indeed, if the statute assumed to fix any other standard for rates than that they should be reasonable, we think it would be much more open to attack than in its present form. * * * Any other standard, unless 'a mere generality,' would surely be challenged as arbitrary."

That efficient service at uniform rates may be had under commission control, which was not available under competitive control alone is clearly indicated in *Union Dry Goods Co. v. Georgia Public Service Corp.*, 142 Ga. 841, 83 S. E. 946, L. R. A. 1916E, 358: "At common law, if a public service corporation served all at reasonable rates, it performed its obligation, but modern in-

dustrial conditions demand the further requirement that it shall serve all with equality. They are usually clothed with the power of eminent domain, and this attribute of sovereignty converts them into quasi-public institutions; and hence it has become the accepted modern doctrine that public service companies must not only serve the public at reasonable rates, but shall also serve the public efficiently and without discrimination. * * * After full investigation, the commission is of the opinion that an enlarged service is necessary and proper under the circumstances, and fix a schedule of rates to be charged for the increased facilities. A few individuals may hold contracts binding the company to rates less than those fixed by the commission as reasonable. Ought the development and necessities of the municipality in situations like this be controlled by a contract with a few individuals, or shall it be considered that the case falls within the proper exercise of the police power in the interest of the common weal? Manifestly, the public health, progress, morals, and general well-being of a municipality can not be bound up in a contract with a few individuals. Hence we think that when the railroad commission prescribed a reasonable rate for electrical lighting and power companies, the rate thus established had the effect of overriding the contractual rate between the public service company and its patrons, made anterior to the commission's order."

§ 894. **Tendency toward "home rule" of local matters.**—As municipalities show greater ability to conduct their own municipal and business affairs there is a general tendency to permit them to do so. This is evidenced by recent constitutional provisions in a number of states granting what is commonly known as "home rule" for municipalities. The first duty of the municipality toward properly disposing of its municipal affairs so far at least as they are concerned with municipal public utilities is the creation of a franchise bureau or a municipal public utility commission for the purpose of securing complete and accurate information concerning the franchise or contract provisions of its municipal public utilities and all other information in regard to their investment, maintenance, and operation; and whether there be a state public utility commission or not, each municipality has problems peculiar to itself and should have complete and accurate information in regard to all its municipal public utilities as well as an administrative body composed of capable experienced men able to cope with those in charge of the affairs of the municipal public utility itself in the interest of the public.

The statutory distinction between municipal ownership and control of public utilities and their state control by commissions is clearly defined and discussed in the case of *Springfield Gas &c. Co. v. Springfield, Illinois*, 257 U. S. 66, 66 L. ed. 131, 42 Sup. Ct. 24, as follows: "The Public Utilities Act and the Municipal Ownership Act were enacted by the state of Illinois within a few days of each other, and, according to the Supreme Court of the state, as parts of a single plan. The former excepts municipal corporations from its requirements, and the latter allows cities to go into this business among others, and to fix the rates, which, in the plaintiff's case, are subject to the approval of the state public utilities commission. * * * The plaintiff's argument, shortly stated, is that, in selling electricity, the city stands like any other party engaged in a commercial enterprise, and that to leave it free in the matter of charges while the plaintiff is subject to the public utilities board is to deny to the plaintiff the equal protection of the laws. But we agree with the Supreme Court of the state that the difference between the two types of corporation warrants the different treatment that they have received. The private corporation, whatever its public duties, is organized for private ends, and may be presumed to intend to make whatever profit the business will allow. The municipal corporation is allowed to go into the business only on the theory that thereby the public welfare will be subserved. So far as gain is an object, it is a gain to a public body, and must be used for public ends. Those who manage the work can not lawfully make private profit their aim, as the plaintiff's directors not only may but must. The Supreme Court seems to interpret the Municipal Ownership Act as limiting the charges allowed to what will be sufficient to meet outlays and expenses of every kind, thus emphasizing the purely public nature of the interests concerned, and excluding the latitude for wrong that the plaintiff fears. * * * But a city council has no such interest in the city's electric plant as to make it incompetent to fix the rates. Whatever the value of the distinction between the private and public functions of the municipality, the duty of its governing board in this respect, as we have said, is public and narrowly fixed by the act."

Where, as is often the case, the theory of "home rule" obtains the necessity for municipal bureaus or commissions to control and regulate public utility service and rates becomes apparent, for as the court said in the case of *St. Cloud Public Service Co. v. St. Cloud, Minnesota*, 265 U. S. 352, 68 L. ed. 1050, 44 Sup. Ct. 492: "It has been long settled that a state may authorize a municipal corporation to establish by an inviolable contract the rates

to be charged by a public service corporation for a definite term, not grossly unreasonable in time, and that the effect of such a contract is to suspend, during its life, the governmental power of fixing and regulating the rates. *Home Tel. Co. v. Los Angeles*, 211 U. S. 265, 273, 53 L. ed. 176, 182, 29 Sup. Ct. 50, and cases there cited. And where a public service corporation and the municipality have power to contract as to rates, and exert that power by fixing the rates to govern during a particular time, the enforcement of such rates is controlled by the obligation resulting from the contract, and the question whether they are confiscatory is immaterial. * * * In the light of these decisions of the Supreme Court of the state of Minnesota we think it is clear that the city had authority, in 1905, under its charter and the laws of the state, to enter, by ordinance, into a contract, in its proprietary capacity and for the benefit of its inhabitants as well as itself, providing for the construction and operation of gas works for a period of thirty years, and fixing the rates to be charged for gas sold to it and its inhabitants. * * * We think that the language of the ordinance, viewed in its entirety, clearly shows that it was the intention of the parties to enter into a contract for the construction of gas works and the manufacture and supply of gas to the city and its inhabitants during the thirty-year period, at the maximum rate prescribed. * * * The city, clearly, could not avail itself of this statute to reduce the gas rates below the maximum prescribed in the contract of 1905; and the company, conversely, can not under it obtain higher rates. The contract is binding on both parties alike."

§ 895. **Municipal franchise bureau or commission necessary.**—Such a bureau or commission should investigate and advise the municipal authorities on all questions of franchise rights and attend to their enforcement constantly and consistently as well as to the service rendered by the company and the reasonableness of the rate received by it for the service, for it is evident that, in a business of such magnitude with as many details of administration and technical questions involved as are common to the affairs of municipal public utilities, the municipality and its inhabitants can only be in position to secure and know that they are receiving proper service at a fair uniform rate by the employment of such men as are capable of investigating such questions equally with the officers of the municipal public utility itself.

In defining the "indeterminate permit" and describing its effect under commission control the court spoke as follows in the case of *Wisconsin Traction, Light, Heat &c. Co. v. Menasha*, 157

Wis. 1, 145 N. W. 231: "Chapter 596, Laws 1911, was published and became effective on July 8, 1911. This act in effect provided that any franchises theretofore granted to a public utility by the state, or through any of its agencies, was so altered and amended as to constitute and be an indeterminate permit within the terms and meaning of sections 1797m1 to 1797m108, inclusive, of the Statutes of 1898, and subject to all the terms, provisions, conditions, and limitations of said sections. The amended franchise is given the same force and effect as a license, permit, or franchise granted after July 11, 1907, to any public utility, subject to the provisions of the public utilities law of 1907. * * * The public utilities law was undoubtedly framed on the theory that certain kinds of business were of such a character that the duplication of plants for the purpose of carrying them on was undesirable, because it resulted in an economic waste, the loss from which in the end usually fell upon the consumer. As to some kinds of business, such as that of operating telephone lines, duplication is not only an added expense to the user, but is apt to be a positive nuisance. Competition in the public utility business in our cities in the end generally resulted in consolidation or an agreement between competing companies as to the rates to be charged. In either event the rates were usually adjusted so as to cover fixed charges, and to yield a return on the cost of constructing the competing plants. These are matters of common knowledge. One of the main purposes of the law was to avoid duplication, and it was thought that by efficiently controlling the rates to be charged by a single utility the consumer would derive the benefit resulting from economy in production. In construing the public utilities laws, the apparent purpose of the legislature should be kept in mind."

Indeterminate permits, however, may not be exchanged for existing franchises without the consent of the parties concerned, because this would be a positive and direct violation of contract rights and a destruction of their integrity. While a state may provide that indeterminate permits shall constitute the term defining the period of duration of franchises granted by the state after the passage of legislative authority providing for such permits, the state may not require that indeterminate permits shall be accepted in exchange for a valid existing franchise which was issued and outstanding before the passage of the statute providing for indeterminate permits. This principle is established and discussed as follows in the case of *Superior Water, Light & Power Co. v. Superior, Wisconsin*, 263 U. S. 125, 68 L. ed. 204, 44 Sup.

Ct. 82, where the court said in part: "In 1907 the Wisconsin legislature enacted the Public Utility Law (Laws 1907, chap. 499, Wis. Stat. sections 1797m1 to 1797m109), which created the railroad commission, a regulatory body, and authorized public utilities to surrender existing franchises, and accept in lieu thereof 'indeterminate permits.' Chapter 596, Laws 1911, repealed the optional feature of the Statute of 1907, and directed that every license, permit, or franchise granted by the state or by any town, village, or city to any corporation, authorizing the latter to operate a plant for furnishing heat, light, water, or power, etc., 'is so altered and amended as to constitute and to be an 'indeterminate permit.' * * * Plaintiff in error has not voluntarily submitted to the Public Utility Law. On October 15, 1917, the prescribed thirty-year limitation expired and plaintiff in error requested the city of Superior either to grant further right to maintain the system of waterworks, or to purchase the same, as provided by the Ordinance of 1887, as amended in 1889. The city failed to make the grant; denied its obligation to purchase; and took steps under provisions of sections 1797m1 to 1797m109, Wisconsin Statutes, to condemn the entire plant. Thereupon plaintiff in error instituted the present cause against the city, its mayor and councilmen. The complaint sets out the foregoing facts, alleges repudiation of the obligation to purchase and the steps taken for condemnation, and asks a decree requiring the city specifically to perform its agreement, for an injunction restraining further efforts to condemn, and for general relief. * * * Considering the opinions of this court, it seems clear enough that a valid contract resulted from the dealings between the city of Superior and plaintiff in error, whereby each became obligated to do certain specified things. The company agreed to construct, maintain, and operate an adequate waterworks system. The city obligated itself to recognize the company's exclusive right to maintain and operate the system for a definite period,—thirty years; and also to purchase the entire plant at a price fixed in the manner specified if, at the conclusion of such period, it should refuse to grant an extension. The rights so acquired by plaintiff in error were property. * * *

"Concerning the relation between the parties, the court below declared: 'The franchise of the Water Company, which enables it to pursue its business of supplying water to the city of Superior and its inhabitants, is a contract between it and the state.' But it held the legislature had power to change this contract under the reservation permitting alterations, in section 1, article

11, of the state Constitution, and that the Act of 1911 did modify the contract by substituting for rights thereby secured an 'indeterminate permit.' Through its contract with the city the water company acquired valuable property rights. They were not directly created by any statute enacted under section 1, article 11, of the state Constitution, but were the outcome of agreement with a fully empowered corporation. They did not arise from the mere exercise of a governmental function legislative in character, but from contract expressly authorized by the legislature. None of the decisions of the Supreme Court of Wisconsin prior to 1889 to which we have been referred construes the reservation in the state constitution as having the extraordinary scope accorded to it below; and certainly, in the absence of some very clear and definite pronouncement, we can not accept the view that it then had the meaning now attributed to it. * * * 'It follows, therefore, "that where, under power in a charter, rights have been acquired and become vested, no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted." Com. v. Essex Co., 13 Gray 239.' See also Water Power cases, 148 Wis. 124, 136, 38 L. R. A. (N. S.) 526, 134 N. W. 330. The integrity of contracts—matter of high public concern—is guarantied against action like that here disclosed by section 10, article 1, of the federal Constitution: 'No state shall * * * pass any * * * law impairing the obligation of contracts.' It was beyond the competency of the legislature to substitute an 'indeterminate permit' for rights acquired under a very clear contract. Vicksburg v. Vicksburg Waterworks Co., 206 U. S. 496, 51 L. ed. 1155, 27 Sup. Ct. 762; Detroit United R. Co. v. Michigan, 242 U. S. 238, 253, 61 L. ed. 268, 275, P. U. R. 1917B, 1010, 37 Sup. Ct. 87. The erroneous conclusion concerning this federal question led to the decree below. Accordingly it must be set aside and the cause remanded for further proceedings not inconsistent with this opinion."

CHAPTER 32

STATE PUBLIC UTILITY COMMISSIONS

| Section | Section |
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| 900. State public utility commissions necessary. | 907. Monopoly under indeterminate permits. |
| 901. State regulation supplants competition. | 908. State commissions first established. |
| 902. Indeterminate franchise properly regulated. | 909. Police power as basis for regulation. |
| 903. State control of capitalization and expenditures essential. | 910. Scope of activity of business requires state commissions. |
| 904. Impartial commission of experts approved by courts. | 911. Abandonment of service. |
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§ 900. State public utility commissions necessary.¹—While the municipal commission, bureau, or other administrative department of the municipality is of great value, the expense of maintaining a properly equipped commission is prohibitive to all but the large municipalities and makes necessary state public utility commissions. Many municipal public utilities are becoming interurban in their scope and are no longer local to the particular municipality whose jurisdiction accordingly is not sufficiently comprehensive to provide the necessary regulation and control. Where several municipalities are alike interested in the control and operation of the same municipal public utility, it is evident that the control which they would thus exercise independently of each other, being naturally local in each instance, could not be uniform. Each municipality is necessarily limited to its own territory so that the only method by which to secure a uniform regulation would be at the hands of the state or through a state public utility commission.

¹ This section (§ 602 of 2d edition) quoted in *Harber v. Phoenix* (Ariz.), P. U. R. 1918D, 352.

§ 901. **State regulation supplants competition.**²—The extent of the information necessary and the scope of the data essential to a comprehensive regulation of service at a fair uniform rate can be secured to the best advantage by the state in connection with a public utility commission of trained experts on the subject. They in turn can serve similar departments of the municipalities of the state in an advisory capacity, and each supplementing the other, can secure the best results at the least expense. The theory of the regulation of municipal public utilities by the state through such a commission is to avoid competition which is now generally recognized as a needless economic waste and an entirely insufficient method of securing the necessary regulation and control. Under this method the state through its commission takes the place of competition and furnishes the regulation which competition can not give, and at the same time avoids the expense of duplication in the investment and operation of competing municipal public utilities.³

² This section of third edition quoted in *McFayden v. Public Utilities Consol. Corp.*, 50 Idaho 651, 299 Pac. 671; *Kansas Gas & Co. v. Public Service Comm.*, 124 Kans. 690, 261 Pac. 592.

³ *United States. Wood v. Vandalia R. Co.*, 231 U. S. 1, 58 L. ed. 97, 34 Sup. Ct. 7; *Louisville & C. R. Co. v. Garrett*, 231 U. S. 298, 58 L. ed. 229, 34 Sup. Ct. 48; *Public Utilities Comm. v. Landon*, 249 U. S. 236, 63 L. ed. 577, 39 Sup. Ct. 268, P. U. R. 1919C, 834, decree vacated in 249 U. S. 590, 63 L. ed. 791, 39 Sup. Ct. 389; *Pawhuska, Oklahoma v. Pawhuska Oil & Co.*, 250 U. S. 394, 63 L. ed. 1054, 39 Sup. Ct. 526, P. U. R. 1919E, 178; *San Antonio, Texas v. San Antonio Public Service Co.*, 255 U. S. 547, 65 L. ed. 777, 41 Sup. Ct. 428, P. U. R. 1921D, 412; *Wichita R. & Co. v. Public Utility Comm.*, 260 U. S. 48, 67 L. ed. 124, 43 Sup. Ct. 51, P. U. R. 1923B, 300; *Keller v. Potomac Elec. Power Co.*, 261 U. S. 428, 67 L. ed. 731, 43 Sup. Ct. 445; *Pacific Tel. & T. Co. v. Kuykendall*, 265 U. S. 196, 68 L. ed. 975, 44 Sup. Ct. 553; *Home Tel. & T. Co. v. Kuykendall*, 265 U. S. 206, 68 L. ed. 982, 44 Sup. Ct. 557; *Michigan Public Utilities Comm. v. Duke*, 266 U. S. 570, 69 L. ed. 445, 45 Sup. Ct. 191; *Fort Smith*

Spelter Co. v. Clear Creek Oil & Co., 267 U. S. 231, 69 L. ed. 588, 45 Sup. Ct. 263; *Buck v. Kuykendall*, 267 U. S. 307, 69 L. ed. 623, 45 Sup. Ct. 324; *Bush v. Maloy*, 267 U. S. 317, 69 L. ed. 627, 45 Sup. Ct. 326; *Banton v. Belt Line R. Corp.*, 268 U. S. 413, 69 L. ed. 1020, 45 Sup. Ct. 534, P. U. R. 1926A, 317; *Henderson Water Co. v. Corporation Comm. of North Carolina*, 269 U. S. 278, 70 L. ed. 272, 46 Sup. Ct. 112, P. U. R. 1926B, 666; *Peoples Nat. Gas Co. v. Public Service Comm. of Pennsylvania*, 270 U. S. 550, 70 L. ed. 726, 46 Sup. Ct. 371, P. U. R. 1926D, 187; *Frost & Co. v. Railroad Comm. of California*, 271 U. S. 583, 70 L. ed. 1101, 46 Sup. Ct. 605, P. U. R. 1926D, 483; *McCardle v. Indianapolis Water Co.*, 272 U. S. 400, 71 L. ed. 316, 47 Sup. Ct. 144, P. U. R. 1927A, 15; *Interstate Busses Corp. v. Holyoke St. R. Co.*, 273 U. S. 45, 71 L. ed. 530, 47 Sup. Ct. 298, P. U. R. 1297B, 46; *Tyson & Bros., Inc. v. Banton*, 273 U. S. 418, 71 L. ed. 718, 47 Sup. Ct. 426; *Washington v. Kuykendall*, 275 U. S. 207, 72 L. ed. 241, 48 Sup. Ct. 41; *Williams v. Standard Oil Co.*, 278 U. S. 235, 73 L. ed. 287, 49 Sup. Ct. 115, P. U. R. 1929A, 450; *Frost v. Corporation Comm. of Oklahoma*, 278 U. S. 515, 73 L. ed. 483, 49 Sup.

Ct. 235, P. U. R. 1929B, 634; Gilchrist v. Interborough Rapid Transit Co., 279 U. S. 159, 73 L. ed. 653, 49 Sup. Ct. 282; Railroad Comm. of California v. Los Angeles R. Corp., 280 U. S. 145, 74 L. ed. 234, 50 Sup. Ct. 71; United R. & Elec. Co. v. West, 280 U. S. 234, 74 L. ed. 390, 50 Sup. Ct. 123, P. U. R. 1930A, 235; Corporation Comm. of Oklahoma v. Lowe, 281 U. S. 431, 74 L. ed. 945, 50 Sup. Ct. 399; Railway Express Agency, Inc. v. State of Virginia, 282 U. S. 440, 75 L. ed. 450, 51 Sup. Ct. 201, P. U. R. 1931B, 228; Smith v. Cahoon, 283 U. S. 553, 75 L. ed. 1264, 51 Sup. Ct. 582, P. U. R. 1931C, 448; East Ohio Gas Co. v. Tax Comm. of Ohio, 283 U. S. 465, 75 L. ed. 700, 51 Sup. Ct. 499; Smith v. Illinois Bell Tel. Co., 283 U. S. 808, 75 L. ed. 1427, 51 Sup. Ct. 646, P. U. R. 1931A, 1; Western Distributing Co. v. Public Service Comm., — U. S. —, 76 L. ed. 655, 52 Sup. Ct. 283, P. U. R. 1932B, 236; New State Ice Co. v. Liebmann, — U. S. —, 76 L. ed. 747, 52 Sup. Ct. 371, P. U. R. 1932B, 433; Champlin Ref. Co. v. Corporation Comm. of Oklahoma, — U. S. —, 76 L. ed. 1062, — Sup. Ct. —.

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Wisconsin. State v. Railroad Commission, 137 Wis. 80, 117 N. W. 846; State v. Kenosha Elec. R. Co., 145 Wis. 337, 129 N. W. 600; La Crosse v. La Crosse Gas &c. Co., 145 Wis. 408, 130 N. W. 530; Cawker v. Meyer, 147 Wis. 320, 133 N. W. 157, 37 L. R. A. (N. S.) 510; Calumet Service Co. v. Chilton, 148 Wis. 334, 135 N. W. 131; Neacy v. Milwaukee, 151 Wis. 504, 139 N. W. 409; Jones v. Racine, 155 Wis. 1, 143 N. W. 707; Wisconsin Trac., L., H. &c. Co. v.

In the consolidation of competing plants and the waiver of the right of the city to purchase the same the court refused to permit the cost of such combined ownership and operation to be collected from its consumers. In the case of *Boise City v. Idaho Power Co.*, 37 Idaho 798, 220 Pac. 483, the court said: "When the power company purchased the system and franchise of the Beaver River Company, it not only purchased certain equipment which, because of the consolidation of the two systems, became duplicate and to an extent unnecessary, but it took the property burdened with the condition that the city of Boise could exercise its reserved right to buy it at the end of the term of the franchise. In making the cancellation contract, wherein Boise agreed to surrender the rights of the city under the franchise,

Menasha, 157 Wis. 1, 145 N. W. 231; *Citizens Tel. Co. v. Railroad Commission*, 157 Wis. 498, 146 N. W. 798; *Oshkosh Waterworks Co. v. Railroad Commission*, 161 Wis. 122, 152 N. W. 476, Ann. Cas. 1915B, 1160; *State v. Oconto Elec. Co.*, 165 Wis. 467, 161 N. W. 789, P. U. R. 1918D, 67, 68; *Superior Water, L. & Co. v. Superior*, 174 Wis. 257, 181 N. W. 113, 183 N. W. 254, P. U. R. 1924A, 790; *Waukesha Gas & Co. v. Railroad Commission*, 181 Wis. 281, 194 N. W. 846, P. U. R. 1923E, 634; *State v. Washburn Water Works Co.*, 182 Wis. 287, 196 N. W. 537; *Wisconsin-Minnesota Light & Co. v. Railroad Commission*, 183 Wis. 96, 197 N. W. 359, P. U. R. 1924C, 534; *Wisconsin-Minnesota Light & Co. v. Railroad Commission*, 183 Wis. 104, 197 N. W. 363, 62 A. L. R. 1483; *Madison R. Co. v. Railroad Commission*, 184 Wis. 164, 198 N. W. 278, P. U. R. 1924D, 379; *Milton v. Railroad Commission*, 185 Wis. 294, 201 N. W. 381; *Wisconsin Southern R. Co. v. Wisconsin Railroad Comm.*, 185 Wis. 313, 201 N. W. 244; *Wisconsin Trac., L., H. & Co. v. Green Bay & Canal Co.*, 188 Wis. 54, 205 N. W. 551; *Chippewa Power Co. v. Railroad Commission*, 188 Wis. 246, 205 N. W. 900; *Pabst Corp. v. Milwaukee*, 190 Wis. 349, 208 N. W. 493, P. U. R. 1926D, 290; *Waukesha Gas & Co. v. Railroad Commission*, 191 Wis. 565, 211 N. W. 760, P. U. R. 1927B, 545; *Commonwealth Tel. Co.*

v. Carley, 192 Wis. 464, 213 N. W. 469, P. U. R. 1927C, 164; *Central Steam Heat & Co. v. Railroad Commission*, 192 Wis. 595, 213 N. W. 298, P. U. R. 1927D, 249; *Wisconsin Gas & Co. v. Atkinson*, 193 Wis. 232, 213 N. W. 873, P. U. R. 1927D, 14; *Pabst Corp. v. Milwaukee*, 193 Wis. 522, 213 N. W. 888, 215 N. W. 670, P. U. R. 1928B, 503; *J. Greensbaum Tanning Co. v. Railroad Commission*, 194 Wis. 634, 217 N. W. 282; *State v. Railroad Commission*, 196 Wis. 410, 220 N. W. 390; *Willow River Power Co. v. Railroad Commission*, 197 Wis. 1, 220 N. W. 173; *Wisconsin Gas & Co. v. Railroad Commission*, 198 Wis. 13, 222 N. W. 783; *Allen v. Railroad Commission*, 202 Wis. 223, 231 N. W. 184; *Hotel Pfister v. Wisconsin Tel. Co.*, 203 Wis. 20, 233 N. W. 617; *Union Coop. Tel. Co. v. Public Service Comm. (Wis.)*, 239 N. W. 409, P. U. R. 1932B, 269; *Milwaukee v. Railroad Commission (Wis.)*, 240 N. W. 165, P. U. R. 1932B, 339; *South Shore Utility Co. v. Railroad Commission (Wis.)*, 240 N. W. 784, P. U. R. 1932B, 465; *State v. Public Service Comm. (Wis.)*, 242 N. W. 668; *Wisconsin Hydro-Elec. Co. v. Railroad Commission (Wis.)*, 243 N. W. 322.

Wyoming. *Salt Creek Transp. Co. v. Public Service Comm.*, 37 Wyo. 488, 263 Pac. 621; *Weaver v. Public Service Comm.*, 40 Wyo. 462, 278 Pac. 542, P. U. R. 1929D, 625.

including the city's right to purchase the property, the power company, it would seem, was merely completing the original purchase of the Beaver River system. * * * It would seem that there would be no more reason or justice in making any users of electricity pay the consideration of the cancelation contract than there would have been in making them pay the original purchase-price of the Beaver River system. * * * It necessarily follows, therefore, that the orders of the commission directing that consideration of the cancelation contract be collected in any manner, either directly or indirectly, from any customers of the Idaho Power Company in the city of Boise, are beyond the power of the commission, and are void."

§ 902. **Indeterminate franchise properly regulated.**—On the other hand is the municipal public utility operating under what the public utilities laws of the states aptly designate as the indeterminate permit which protects the municipal public utility against competition and a total loss which may occur at the expiration of the franchise? Under this law the public utility commission determines in the first instance whether public convenience and necessity demand municipal public utility service where such a company proposes to install its plant and furnish such service, and only after a determination of this question in the affirmative and the granting of its consent by the commission may the municipal public utility plant be installed; thus needless competition is avoided by legalizing a monopoly. The consideration, however, for such franchises and exclusive privileges is that they shall be constantly and completely under the regulation and control of the state through its public utility commission both as to rates and service.

§ 903. **State control of capitalization and expenditures essential.**—This control covers the question of the capitalization of the municipal public utility so that the amount of stock and bonds issued by such a company is determined by the public utility commission, which also supervises the construction of the plant, thus insuring the expenditure on the plant of all funds received from the sale of such stock and bonds as well as limiting the expenditure and preventing extravagance or unnecessary construction. This control over the capitalization and issuance of stocks and bonds of the municipal public utility by the state not only protects the consumer of the service in a fair rate but also the investor in the public utility securities, insuring on the one hand proper service at a reasonable rate as determined by the actual

cost and, on the other, a fair return on the investment actually put into the business. By such regulation capitalization and investment coincide which simplifies the matter of rate regulation as well as that of making investments in the securities of such companies and preventing fluctuation in their values.

That state control over the capitalization and service of public utilities as natural monopolies by means of commissions is preferable, is clearly indicated in the case of *State v. Kansas City Gas Co.*, 254 Mo. 515, 163 S. W. 854, as follows: "That act is an elaborate law bottomed on the police power. It evidences a public policy hammered out on the anvil of public discussion. It apparently recognizes certain generally accepted economic principles and conditions, to wit: That a public utility (like gas, water, car service, etc.) is in its nature a monopoly; that competition is inadequate to protect the public, and, if it exists, is likely to become an economic waste; that state regulation takes the place of and stands for competition; that such regulation, to command respect from patron or utility owner, must be in the name of the overlord, the state, and to be effective, must possess the power of intelligent visitation and the plenary supervision of every business feature to be finally (however invisible) reflected in rates and quality of service. It recognizes that every expenditure, every dereliction, every share of stock, or bond, or note issued as surety is finally reflected in rates and quality of service to the public, as does the moisture which arises in the atmosphere finally descend in rain upon the just and unjust willy nilly. That there has been a vast increase in such utilities in the last decade or two, and that evils have grown up crying out lustily for a cure by the lawmaker, is writ larger in current history. The act, then, is a highly remedial one filling a manifest want, is worthy a hopeful future, and on well-settled legal principles is to be liberally construed to further its life and purpose by advancing the benefits in view, and retarding the mischiefs struck at—all pro bono publico. Besides all which the lawmaker himself has prescribed, it 'shall be liberally construed with a view to the public welfare, efficient facilities and substantial justice between patrons and public utilities.'"

To the same effect the history of the control of stock and bond issues by the state is discussed at length in *Laird v. Baltimore & O. R. Co.*, 121 Md. 179, 88 Atl. 347, 47 L. R. A. (N. S.) 1167, Ann. Cas. 1915B, 728: "That issues of stocks and bonds have been made fraudulently and palmed off on a credulous public to their ultimate serious loss is matter of common knowledge. Facts in relation to such issues, especially with regard to local

public utilities, have been difficult, if not impossible, to obtain, leaving it to the stimulated imagination of some broker or syndicate who, actuated by a heavy commission to be realized by creating a market until such stock or bonds could be unloaded, have reaped a reward in dollars and cents at the cost of those who were induced to give full faith and credit to their representations. The legislatures of many states have therefore, through the media of public service commissions, seen fit to establish a quasi-guardianship over prospective investors. It is of course true that in such a condition many legitimate enterprises should come under the same sort of suspicion which attaches to the more hazardous schemes devised and carried on for the improper enrichment of a few individuals. As a check upon such wild financing it is entirely proper, even upon the basis of the exercise of the police power, to require all corporations conducting public utilities to lay before the local public service commission the facts relating to any such issue of stocks and bonds or debentures or certificates of indebtedness, thus placing such facts where they will be readily obtainable by anyone who has an interest therein other than mere idle curiosity. Such statements as indicated in the acts passed should include the amount of the issue, in a general way the purposes for which it is desired to be made, and, where the enterprise is one to be conducted wholly within a single state, it may well be, as the decisions seem to indicate, that the commission may sanction or disapprove of the proposition."

The control of state commissions over matters of capitalization as well as those of service and rate regulation is fully indicated in the case of *State v. Public Service Comm.*, 259 Mo. 704, 168 S. W. 1156, where the court said: "Recognizing that a negligently wasteful corporate life, a diseased or dishonest corporate life, or a slovenly lack of care in safety and adequacy of service are matters of public concern, are necessarily reflected in rates and income, and that regulation lies within the police power, the legislature, as seen in paragraph 2, charged the commission with the duty of supervision over corporate bookkeeping, stock issues, bond issues, and creation of other indebtedness, sales of franchise, as well as in matters of safety and adequacy in service. In fine, it gave the commission plenary power to coerce a public utility corporation into a safe and adequate service and the performance of the public duty unto which its franchise bound it. On the other hand, the act does not contemplate a confiscation of corporate property, and we include in the term 'property' the

right to earn a reasonable return on its investment. * * * In so far as elder statutes undertook to make hard and fast rates, charges that might be lowered, but not raised so as to conform with 'reasonable compensation,' or 'reasonable average return on the value of the property actually used in the public service' by the corporation, it must be held they were inconsistent and in conflict with the utilities act in those particulars, and stand modified by the later act when the facts warrant, which later act under canonized rules of construction, and as a younger act covering the field, must control. It is not necessary for us to hold that all statutory rate provisions were eo instante and ipso facto repealed. It is sufficient for us to hold, and we do hold, that the legislature could delegate to the commission, as an administrative body, the power to ascertain facts warranting a readjustment of rates in accordance with general statutory rules announced by the lawmaker (as in the case here), and that when such rate was so ascertained the modification of rates contemplated by the statute might take effect under the orders of the commission despite the elder statutes. This leaves statutory maximum rates in force until facts established before the commission call into play the modifications contemplated by the utilities act."

The necessity and advantage of state control over the issuance of stock and bonds by public utilities are indicated by the court in the case of Fall River Gas Works Co. v. Board of Gas & Electric Light Comrs., 214 Mass. 529, 102 N. E. 475: "In the early statutes authorizing the increase of stock not much was said about the manner of the issue. It could be issued by a vote of the corporation provided the issue was for the purposes of the charter and did not exceed the amount of the capital authorized by law. St. 1830, ch. 53, § 3; Rev. St. 1836, ch. 38, § 11. Then came a provision that no share should be issued for a less sum, actually paid in cash, than the par value of shares first issued. St. 1851, ch. 133, §§ 8, 16; St. 1858, ch. 167; St. 1859, ch. 104; Gen. St. 1860, ch. 61, §§ 6, 9. Gas companies could increase their stock at will for the purposes of the business for which they were chartered, subject only to the conditions that the stock should not exceed the amount fixed by the charter or by a general statute, as the case might be, and that the payment for the same should be made in cash to the amount of the par value. St. 1851, ch. 133, §§ 8, 16; St. 1855, ch. 146; Gen. Stat. 1860, ch. 61, §§ 6, 15, 18. * * * In view of the legislation leading up to St. 1894, ch. 450, and of the obvious reasons, so far as respects the public served by these corporations, and reasons somewhat

different but equally obvious so far as respects the bondholders and stockholders, for a change which should result in an authoritative and more efficient enforcement of the law as to the issue of stock, we are of opinion that it was the manifest purpose and legal effect of this statute, reenacted in R. L., ch. 109, § 24, to change the whole method of the issue of stock by the public service corporations therein named, and to take away from such corporations and to invest in public officers the right to determine the general question of the reasonable necessity of the issue. And the decision of the board is final unless based upon some error of law."

While the public service commission, under the statutes of the state, may regulate the issuance of securities by public utilities, it may not unduly restrict the giving of mortgages to refund outstanding debts secured by mortgages, as was indicated in the case of *Alabama Public Service Comm. v. Mobile Gas Co.*, 213 Ala. 50, 104 So. 538, 41 A. L. R. 872, P. U. R. 1926C, 266: "The police power of the state to reasonably supervise, regulate, and prescribe rates for public utilities has been jealously guarded; it has been held that it may not be abridged or suspended by contract between citizens of the state, or by a municipality and its citizens. * * * The authority of the public service commission to regulate the issuance of securities by public utilities is given statement in the Act approved October 1, 1920, General and Local Acts, Sp. Sess. 1920, p. 38 et seq. * * * The function of the commission in regulating the issue and assumption of securities by utilities is a part of its general and exclusive powers and jurisdiction to regulate and supervise every utility in respect of its rates, service regulations, etc., its franchises, licenses, and contracts, in so far as they affect said rates and service regulations, and in respect of its financing and securities in accordance with the provisions and subject to the reservations of the Public Utility Act of 1920, and its due administration under the federal decisions and the Constitutions of the state and the United States. * * * The present ruling sought to be reviewed is whether, under the material facts of this case, the commission had the right to restrict alienation by mortgage, as it did, to eighty per cent of the value of the company's properties to obtain funds for the payment of debts secured by the underlying mortgage of January 1, 1910. * * * In doing so, a due regard must be had for the 'showing of emergency' in the premises, and the 'danger to vital interests of petitioner' that may follow a denial of the petition, as well as reference to the fair value of petitioner's properties. We are fearful that the limita-

tion of the issue to an eighty per cent of value, as finds expression concerning the purposes indicated in section 6 of the second or refunding mortgage of 1921, has been given by the commission application to facts that may not be regulated thereby, independent of the relevant and material facts entering therein."

Public utility commissions often have express statutory authority to regulate the issuance of securities of public utilities and to limit their amount in relation to the value of the property invested in the utility and the returns upon such investment, and where this is provided, either expressly or by implication, it is the duty of the commission to determine the proper rate base and reasonable rate for the service before authorizing the issuance of securities by any public utility. This principle was established and discussed as follows in the case of Wisconsin Hydro-Electric Co. v. Railroad Commission (Wis.), 243 N. W. 322: "So far as the record discloses, defendant refused to permit the issuance of securities upon a basis which included assets acquired by customers' donations simply because the rate schedule of the plaintiff's predecessor did not permit such predecessor to earn a return upon the amount of such donations. Clearly, in determining the amount of securities that may be issued upon a public utility property, the question of the return which the utility may be permitted to earn upon its property can not be ignored. That is one of the elements which section 184.09, Stats. (1929), contemplates shall be taken into consideration by the commission in determining the amount of securities that the utility company may be permitted to issue upon its property. Under the public policy of this state, as evidenced by its legislative enactments and recognized by this court in *State ex rel. Central S. H. & P. Co. v. Gettle*, 196 Wis. 1, 220 N. W. 201, the authority of a public utility to issue stocks and bonds is a mere privilege which is subject to such legislative regulations as are prescribed in section 184.09, Stats. Rightly, the legislature has not confined the factual basis, which the commission is to ascertain and consider in determining the amount of the security issues, to merely the value of the assets to which the corporation technically has title.

* * * Manifestly, reasonable protection to prospective purchasers is to constitute an important consideration. Their original contributions were for a special purpose, namely, the receipt of service up to the time that the utility should occupy the field and assume a position where it became legally bound to furnish service generally at a uniform schedule of rates to all consumers in that zone. With the termination of that special

right on the part of the donors, the utility's title to the property thus donated is no longer burdened with any such correlative rights or conditions. The utility as the owner thereof is then entitled to earn the same reasonable return upon the present fair value thereof, as it is upon all other property owned by it, which is actually used and useful in providing the service."

§ 904. Impartial commission of experts approved by courts.⁴

—The courts have been among the first and most ardent supporters of this form of regulation because it is practicable, inexpensive and at the same time efficient and summary. That the former method of placing the control of municipal public utilities in the companies themselves, or in the city official, who determines the personnel of the municipal control, has been modified by the creation of state public utility commissions was well expressed in the case of *Des Moines Water Co. v. Des Moines, Iowa*, 192 Fed. 193, decided in 1911, where the court said: "The present expensive chaos should be brought to an end. It is known by all informed men that city councils necessarily adopt rates with but little or no investigation as to what rates ought to be fixed. The result is that we have ordinances fixing rates based upon but little intelligent effort for the ascertainment of the facts. Some of the states, like New York, Massachusetts, and Wisconsin, have state commissions of competent men, who give public hearings, and who do nothing behind doors, nor in secrecy—a commission with no member interested as a taxpayer of the city, and with no member subjected to influences other than the ascertainment of the truth and the facts. Rates are thus fixed with which most fair-minded people are ready to acquiesce. It is strange that we have no such legislation and no such commissions in Iowa."

That a specially trained body of experts in charge of public utility matters is necessary and should be expected and permitted to dispose of such questions in the exercise of their best judgment, unless their action is arbitrary or unreasonable, is the basis of the principle of commission control as expressed in the case of *State Public Utilities Comm. v. Springfield Gas & Electric Co.*, 291 Ill. 209, 125 N. E. 891, P. U. R. 1920C, 640: "The law is settled in this state that the matter of rate regulation is essentially one of legislative control. The fixing of rates is not a judicial function, and the right to review the conclusion

⁴ This section (§ 606 of 2d edition) quoted in *Harber v. Phoenix* (Ariz.), P. U. R. 1918D, 352.

of the legislature or administrative body, acting under authority delegated by the legislature, is limited to determining whether or not the legislature or the administrative body acted within the scope of its authority, or the order is without substantial foundation in the evidence, or a constitutional right of the utility has been infringed upon by fixing rates which are confiscatory or insufficient to pay the cost of operating expenses and give the utility a reasonable return on the present value of its property. *Chicago, Milwaukee & St. Paul Railway Co. v. Public Utilities Comm.*, 268 Ill. 49, 108 N. E. 729, P. U. R. 1915D, 133; *Public Utilities Comm. v. Chicago & West Towns Railway Co.*, 275 Ill. 555, 114 N. E. 325, Ann. Cas. 1917C, 50, P. U. R. 1917B, 1046. The Public Utilities Act gives the courts power to determine whether or not evidence has been properly received or rejected, and whether there is sufficient evidence in the record to support the finding of the commission. If the order does not contravene any constitutional limitation and is within the constitutional and statutory authority of the commission and has a substantial basis in the evidence, it can not be set aside by the courts. The court is without authority to set aside such an order unless it is against the manifest weight of the evidence. * * * It is clear from the salary fixed for the commissioners and the great power vested in the commission by the Public Utilities Act that the legislature intended to create an office of dignity and great responsibility. It is, therefore, not to be expected that through fear of popular disfavor the commission will coyly toy with the situation. It sits to administer justice to individual and corporation, the weak, the strong, the poor, the wealthy, indifferently, fearing none and fawning on none. The notion that commissions of this kind should be closely restricted by the courts, and that justice in our day can only be had in courts, is not conducive to the best results. There is no reason why the members of the public utilities commission of this state should not develop and establish a system of rules and precedents as wise and beneficial, within their sphere of action, as those established by the early common-law judges. All doubts as to the propriety of means or methods used in the exercise of a power clearly conferred should be resolved in favor of the action of the commissioners in the interest of the administration of the law. There should be ascribed to them the strength due to the judgment of a tribunal appointed by law and informed by experience. * * * The necessity of public regulation of rates arises out of the monopoly of the public service company. The unregulated price of the service ceases, except so

far as some substitute for the particular service may be found, to be determined by competition, and the individual consumer is unable to contract on equal terms. Fixing rates by public authority may secure to each individual the advantage of collective bargaining by or in behalf of the whole body of consumers, and result in such rate as might properly be supposed to result from free competition if free competition were possible. A just and reasonable rate, therefore, is necessarily a question of sound business judgment rather than one of legal formula, and must often be tentative, since exact results can not be foretold."

That actions of the commission are not judicial but legislative or administrative and subject to review by the courts was clearly decided in the case of *People v. Peoria & P. U. R. Co.*, 273 Ill. 440, 113 N. E. 68, P. U. R. 1916E, 795, as follows: "The state public utilities commission has no jurisdiction to adjudicate upon the controverted rights of parties growing out of their contracts. The question of the effect of the contract between the railway company and Sholl Brothers was a judicial question, of which the commission had no jurisdiction. The legislature had not the power to confer such jurisdiction even had it attempted to do so, and had not the power to take away or suspend the jurisdiction of the circuit court, to which the constitution has given original jurisdiction of all causes in law and equity. The commission might, in the course of its proceedings, have to take cognizance of the rights created by that contract, but it was not authorized to construe and apply the law and make a judicial determination of those rights. In the absence of a judicial sentence the commission could make such order, in the exercise of its administrative authority, as it deemed just and legal, and could exercise its judgment as to the effect of the contract, leaving the parties to such legal or equitable remedies as they might be entitled to. A hearing before the commission is not a judicial proceeding, though the statute provides for an appeal to the circuit court of Sangamon County. When a question of which a court has jurisdiction has been adjudicated by that court the adjudication is final, so far as the commission is concerned. Whether the determination of the circuit court was right or wrong, it must be accepted in this case as settling the rights of the parties."

The freedom of the commissions from the control of the courts and the legislatures within the sphere of their authority, is succinctly expressed in the case of *Wisconsin-Minnesota Light & Co. v. Railroad Commission*, 183 Wis. 104, 197 N. W. 359, P. U. R. 1924C, 534, as follows: "So far as we are able to discover, the

statute has prescribed no rule of valuation, nor in any way limited nor even directed the commission as to the basis to be adopted in making its determination. * * * In the absence of such a statutory provision, it is certainly not within the province of the court to lay down rules in an attempt to govern an administrative body in the performance of its duties. * * * In the absence of a method prescribed by the statute, the commission may proceed as it pleases. It is not its method that is to be reviewed, but the result reached by the commission. * * * We know of no constitutional principles of valuation."

This same court in a later case defined the powers and duties of the commission as follows in the case of *Commonwealth Tel. Co. v. Carley*, 192 Wis. 464, 213 N. W. 469, P. U. R. 1927C, 164: "In *Chippewa Power Co. v. Railroad Commission*, 188 Wis. 246, 205 N. W. 900, it was held that the legislative definition of a public utility was intended to include all corporations that were functioning as a public utility under the guise of a private utility. So that, applying the holding of the *Chippewa* case above referred to, to the instant case, we must arrive at the conclusion that the defendants herein may be treated as public utilities, even though they were organized as private corporations, where in fact they operated as public utilities, and notwithstanding the fact that they had not complied with the provisions of the Public Utility Act, which includes the antiduplication statute. * * * From the foregoing it necessarily follows that, if the defendants during the period charged in the complaint were in fact operating as public utilities, then their control and regulation vests in the railroad commission. * * * The * * * quotation from the statutes manifests a marked and important change with respect to the powers and duties and the jurisdiction of the railroad commission, and this change consists mainly in broadening and extending the jurisdiction, powers, and duties of the railroad commission so as to include, not only railroads, but all public utilities. * * * The railroad commission is composed of specialists in their field, who are equipped, by reason of their office, their experience, and the nature of their work, with special qualifications to perform the administrative duties devolved upon them by statute. They also possess facilities enhancing their ability to properly perform their work which are not ordinarily possessed by individuals, corporations, or even the courts. * * * Under the common law a utility had no right to a monopoly, and, to the extent that it now possesses such rights in a limited degree, it traces such rights to the statute. If the services ren-

dered by a company are of a public nature, they come ipso facto under the jurisdiction of the commission for administrative purposes. If in the operation of their business they perform services to or for the public in the field of public utilities, they are in law and in fact public utilities, and, at least to the extent that they serve the public, the commission has jurisdiction over them for regulation and control purposes."

A recent definition of the purpose and powers of public utility commissions and of the favorable attitude of our courts toward them is found in the case of Board of Public Utility Comrs. v. Plainfield-Union Water Co., 30 Fed. (2d) 859, where the court said: "We are constrained, however, to modify the decree in respect to costs in the trial court there charged against the public utility commissioners. That body is an unincorporated association of individuals appointed by the state of New Jersey to perform certain state functions and carry out certain state policies. It is wholly without funds, except such as are from time to time supplied it by state appropriations for specific expenditures. The members of the body do not act as individuals, and therefore are not personally liable for costs. Nor, under the established rule, is the state, when sued without its consent, chargeable with costs. Yet, as the state has set up a governmental instrumentality which, from its very nature, brings it constantly into the courts, where as a litigant it asserts and defends its rights against its citizens, we think it highly probable that the state, through the legislature, might desire to meet what seemingly is a moral obligation, by making the necessary appropriation. Therefore we make a finding that the costs in this case, both below and on appeal, are, so far as they have been taxed and when the small balance is properly taxed, correct in amount. The decree, when modified by relieving the commissioners of payment of costs, is affirmed."

As the public service commission is charged with the duty of determining valuations and fixing reasonable rates for service as well as rules for rendering service, the courts will not attempt to determine any such matters until the commission has passed upon them in the first instance. In thus sustaining the validity and authority of the plan of commission control of public utilities, the court, in the case of United States Light & Heat Corp. v. Niagara Falls Gas & Electric Light Co., 47 Fed. (2d) 567, said: "The plaintiff has a place of business in the city of Niagara Falls where it is a user of fuel and claims that the use of gas by it would be more economic, efficient, and useful, * * *

and the plaintiff, while not claiming to be a consumer of gas, contends that it has a property right to the service of the gas company in that city. * * * Neither the plaintiff nor the intervenor Hamann (a consumer) has complained of the rates as fixed by the commission under the several provisions of the Public Service Law. * * * Thus the plaintiff, if aggrieved, might have joined others, twenty-five in number, and have been heard and afforded relief under the provisions of this law. Matters respecting rates, charges, or classification of service might have been considered. These provisions of the state law providing for regulation of rates, charges, and service are presumptively valid and constitutional. * * * A consumer or prospective consumer of gas has only such right as the Public Service Law gives him to complain of charges or service. * * * Thus the gas company's business becomes subject to the Public Service Law by reason of the interest which the public has. It must submit to the control by the public service commission for the common good to the extent which it has clothed its property with public interest. But a citizen has no vested rights in statutory privileges or exemption. *Cooley, Constitutional Limitations* (8th ed.) 792. This gas company became bound to furnish gas within the city of Niagara Falls by reason of the Public Service Law. The consumer was not obliged to purchase gas; he was privileged to do so. * * * If there be an exercise of arbitrary power against the consumer and wrongful enforcement by the commission of the Public Service Law, a remedy is afforded under the provisions referred to for the consumer to lodge his complaint, obtain a hearing, and redress. *City of Rochester v. Rochester Gas Co.*, 233 N. Y. 39, 134 N. E. 828. The gas company likewise has a remedy if its property is being confiscated by first proceeding under the provisions of the Public Service Law, and if, after such proceedings, it feels aggrieved, it may test its complaint in proceedings in the state court or by suit for an injunction based upon a claim of confiscation of its property without due process of law."

§ 905. **Commission made necessary by importance and complexity of problem.**—The complexity of the question and the importance of its proper solution by public utility commissions, were indicated in the case of *La Crosse v. La Crosse Gas & Electric Co.*, 145 Wis. 408, 130 N. W. 530, decided in 1911, where the court said: "It is useless to extend this opinion further for the purpose of picturing the situation dealt with by the legislature. The

magnitude of the task was great. Few, if any, greater have been dealt with in our legislative history. The result stands significant as a monument to legislative wisdom. That such a complicated situation has been met by written law in such a way as to avoid successful attack up to this time on the validity of the law or any part of it, and avoid attack at all either upon the law or its administration, except in a very few instances, and secure optional submission by many owners of old franchises to a displacement of their privileges, is quite a marvel. * * * Doubtless, we reiterate, it was thought that sound policy required old franchises with their multiplicity of differences to be brought under one system so that the things formerly privileged might continue to be so but solely under conditions and limitations referable to a single standard, to wit, the public utility law, with its administrative board to dominate the situation as between the owners of privileges and the public, to the end that each might be coerced, if need be, to deal justly with the other, accomplishing an era of fair exchange of equivalents involving service being furnished customers of the best character and at the lowest price practicable and without discrimination, and rendition therefor of such just and reasonable compensation as under the circumstances of each situation would render performance of the mutual obligations practicable."

The scope and purpose of state public utility commissions are succinctly stated in the case of *Portland R., Light & Power Co. v. Portland, Oregon*, 210 Fed. 667: "The purpose was to provide a uniform system throughout the entire state for the control and regulation of public utilities and fixing the rates to be charged by them, and to create a tribunal for that purpose. It is true the Public Utility Act does recognize the authority of municipalities over public service corporations within its boundaries for certain purposes, but not in the matter of regulating or prescribing rates or fares. That power is vested alone in the public service commission."

The purpose and practical advantages of commission control are briefly and well stated in the case of *State v. Atkinson*, 275 Mo. 325, 204 S. W. 897, P. U. R. 1919A, 343: "Let it be conceded that the act establishing the public service commission, defining its powers and prescribing its duties, is indicative of a policy designed, in every proper case, to substitute regulated monopoly for destructive competition. The spirit of this policy is the protection of the public. The protection given the utility is incidental. The policy covers a particular case when competition would im-

pair or destroy a utility and, as a consequence, eventually entail an increase of rates charged the public. There are other considerations, of course, but that mentioned forms the principal basis of the rule. A corollary is that, ordinarily, high rates do not call for the introduction of competitive conditions."

§ 906. **Franchise provisions and matters of administration described.**—One of the best arguments in favor of the state public utility commission which at the same time describes in detail the nature of the indeterminate franchise and the reason for its adoption is furnished in the case of *Calumet Service Co. v. Chilton*, 148 Wis. 334, 135 N. W. 131, decided in 1912, where the court said: "So the findings are amply sustained that the electric company, December 21, 1907, acquired an indeterminate permit. The surrender proceedings in form and substance were without infirmity; the company had all the essentials of capacity to make the exchange—(a) it was a public utility; (b) it was a duly organized corporation under the laws of this state; (c) it had a 'license, permit or franchise' to do public utility business in the city of Chilton; and (d) it was operating under such 'license, permit or franchise.' * * * The findings are to the effect that only the privilege feature of the old franchise survived the surrender for its equivalent emanating directly from the state; that all the conditions and limitations of the old one and all contract features between the city and the owners of the privilege inherent in the grant, were extinguished by the surrender and superseded by the 'conditions and limitations' of the public utility law. * * * In other words, the idea is that the grantee, under state control, and subject to prescribed limitations and supervision, shall have a 'monopoly,' as it has been several times called by the railroad commission, in its administrative work, and by this court, within the field covered by the privilege, as to rendering the particular public utility service, whether directly or indirectly, to or for the public. We should say, in passing, that the term 'monopoly' as thus used is to be taken in the sense of a mere exclusive privilege granted for a consideration equivalent; monopoly only in the sense that the field of activity is reserved to the grantee—the mere element of exclusiveness. * * * The evident intention of the legislature, expressed in unambiguous language, when read in the light of the situation dealt with, was * * * to substitute a new situation, all looking to unity, in practical effect, of a multitude of diverse units corresponding to the many outstanding franchises, and others in prospect, harmonizing them by making them referable to a single standard,

to wit, the public utility law, and to an ultimate single control, to wit, control by the trained impartial state commission, so as to effect the one supreme purpose, i. e., 'the best service practicable at reasonable cost to consumers in all cases and as near a uniform rate for service as varying circumstances and conditions would permit—a condition as near the ideal probably as could be attained.' "

State commissions are necessary to secure prompt and efficient control and proper rate adjustments, and they are favored by the courts, as was clearly indicated in the case of *Garson v. Steamboat Canal Co.*, 43 Nev. 298, 185 Pac. 801, P. U. R. 1920D, 1: "The Public Service Commission Act is the direct outgrowth of an urgent and persistent public demand for prompt, intelligent, and effective public control of public utilities. It is founded on necessity and convenience. Competition did not prove effective in preventing monopoly by public utility companies, and its consequent burden on the public in the different classes of public service rendered by them. It is recognized, also, that the rate-making power and the power to regulate and control these enterprises, vested by the constitution in the legislature, could not be conveniently exercised by that body to meet the changing conditions, which make the rates a public utility may lawfully charge for its service vary in value from time to time. These exigencies were met by the legislature in the formation of the governmental agency designated, in the act creating it, as a public service commission. The law presumes that the members of the commission shall be men trained in those lines of business in which public utilities are engaged, and who can fairly and intelligently adjust the complex questions that constantly arise. Necessarily to make the act effective to answer the purposes of its enactment, the commission has been clothed with broad discretionary powers; and to further accomplish these purposes the orders of the commission as to rates and charges have been made *prima facie* lawful from the date of the order until changed or modified by the commission, or until found to be unreasonable in pursuance of section 26 of the act."

The operation of public utilities and the nature of the service which the company is bound to furnish are matters for the decision of the railroad commission under its general powers of regulation, for as the court said in *State v. Broad River Power Co.*, 166 S. Car. 207, 164 S. E. 637: "The court is of the opinion that it is no longer necessary for this litigation to be continued here. We think that all the matters complained of, and urged as

grounds for objection to the dismissal of the suit in this court, relate incidentally to the operation of the transportation system, which the respondents, companies, are bound to furnish, under the decision of this court, to the city of Columbia and its environs, and that all these matters may be properly considered, acted upon, and decided by the railroad commission of South Carolina. That commission, under the law, is charged with the supervision of street railway companies. Section 8501 of the Code of 1932, a part of the Act of the General Assembly of 1920 (31 Stats. 742), forbids a street car company from operating a car with a flat wheel, broken window, or leaky roof or side. Under that section, all corporations operating electric railways are required to keep their cars convenient, comfortable, and clean, and the railroad commission is charged with the enforcement of the law, and any street railway company is subject to penalties for violation of its terms. * * * It seems unnecessary for the court to say that it will be the duty of the railroad commission to carry out the order of the court. To repeat, that order was to the effect that the respondents, companies, should comply 'with the requirements of their charters, contracts and provisions of law applicable thereto.' Any person interested, under the law, will have at any time the right and privilege to apply to the railroad commission for relief, if the respondents, companies, in any way fail to perform their duty to the public."

Under proper statutory authority, the cost of regulation of public utilities may be imposed upon them by the public service commission as one of their franchise obligations. Costs of regulation or investigation of public utilities which are incurred as the result of a fact-finding investigation by the commission for its general use can not properly be imposed upon a particular public utility, because the purpose is public and for the benefit of the commission. This principle was discussed and established as follows in *Wisconsin Tel. Co. v. Public Service Comm.*, 206 Wis. 589, 240 N. W. 411, P. U. R. 1932B, 195: "This act imposes upon the public utilities the expense resulting from their regulation by the state. * * * This action was brought to restrain the public service commission from making said assessment on the ground that said act is unconstitutional. There is a general challenge on the part of the plaintiff to the power of the legislature to impose upon the public utilities of the state the cost of their regulation. We think such power undoubtedly resides in the legislature. It is a well-settled principle that the cost of

regulating and supervising certain businesses may be imposed upon such businesses so long as the amount imposed does not exceed the reasonable cost of regulation and so far as the power is not prostituted to the purpose of raising general revenue.

* * * It is well settled in this country that the regulation of public utilities is a necessary governmental function, and no reason is seen why the state may not impose upon them the expense of regulation. Public utilities can not function as such except as they receive a franchise from the state, and the state, as a condition of granting the franchise, may impose upon them the cost of regulation. *Fox River Paper Co. v. Wisconsin R. Commission* (1927) 274 U. S. 651, 71 L. ed. 1279, 47 Sup. Ct. 669. * * *

It is apparent that, if the commission is to accomplish the highest economy in the matter of management on the part of public utility companies, it is necessary for it to keep abreast of the best and most modern methods, and for the purpose of securing this information it is authorized to make examinations of well-conducted companies. But to make such companies pay the expenses of disseminating such information would be to penalize rather than to reward merit, and would be intuitively condemned as unjust by every fair-minded man. We apprehend that the statute would more nearly express the legislative intent if it imposed upon the utility investigated the costs of the investigation, except in cases where the investigation is conducted for general, public, or informative purposes, leaving it to the commission to determine whether the investigation was for such purposes. The assault upon this proviso is that a determination of the question of what public interest requires is a purely legislative function which can not be delegated to the public service commission, and that the legislature has left to the commission the power to legislate as to what the public interest requires. * * * It was not the legislative intent to confer upon the public service commission the arbitrary power which resides in the legislature itself to determine what constitutes public interest. The legislature possesses arbitrary power in such matters, and may determine that to be in the public interest which the great majority of the people believe otherwise. When they so determine, there can be no appeal. * * * While the fixing of standards by which the administrative body is to be guided in the exercise of such powers is not infrequent, as appears * * * from the general rule on the subject, such standards are not necessary in order to constitute the power delegated administrative rather than legislative."

§ 907. **Monopoly under indeterminate permits.**—This case supplements that of *State v. Kenosha Electric R. Co.*, 145 Wis. 337, 129 N. W. 600, decided in 1911, which furnished a further statement and explanation of the indeterminate franchise plan as provided for in the public utilities law of Wisconsin, where the court said: "The intent was to give the holder of an indeterminate permit, within the scope thereof, a monopoly, so long as the convenience and necessities of the public should be reasonably satisfied, yet to secure to the public the benefit of the monopoly in excess of a fair return upon the investment, under proper administration, by insuring to the consumers the best practicable service at the lowest practicable cost, and to that end prohibit, conditionally, the granting of just such franchises as the one challenged in this case in the circumstances under which the ordinance of June 7, 1909, was passed. * * * Here the legislature provided, in effect, that in case of there existing under an indeterminate permit, a right of a corporation to enjoy such privileges as are involved in this case, no other permit or franchise shall be granted to anyone to invade, in whole or in part, the same field, except upon a specified condition involving the ascertainment of a fact. * * * The mere administrative labor of ascertaining the fact, is not legislative power at all in the undeleable sense. Such administrative feature does not involve any element of expediency or legislative discretion, but only the judgment and discretion which any person or body commonly exercises to ascertain whether a given situation satisfied the calls of a rule prescribed by higher authority to a lower for guidance and enforcement."

That proper regulation by a state commission is preferable to competition was clearly indicated in the decision of the case of *State Public Utilities Comm. v. Romberg*, 275 Ill. 432, 114 N. E. 191, P. U. R. 1917B, 355, as follows: "The public policy of the state, as declared by section 22, article 4, of the Constitution, is not opposed to the elimination of competition in all cases, but only applies where a 'monopoly', in the sense in which that word was used in the common law, would be thereby created, viz., where competition is eliminated by conferring upon a specified person or corporation the right to exclude all others from engaging in the same business, in the same field of operation, or by upholding the validity of contracts and agreements which place it within the power of certain individuals or corporations to control production and fix prices, thereby resulting in injury to the public. No such consequences can follow the purchase by the Amer-

ican Company of a controlling interest in the Interstate Company under the authority conferred upon it by the State Public Utilities Act. The American Company will not, by this purchase, acquire the right to exclude any other person or corporation from engaging in the telephone business in the same field of operation, nor will it be within its power to arbitrarily limit the service to be furnished to the public, or fix the rates to be charged for the service rendered. The state possesses the right to exercise supervision over public utilities with reference to such matters, and has made provision for the exercise of such right through the state public utilities commission. Instead of resulting in injury to the public, the tendency of the elimination of the Interstate Company as a competitor of the Bell system would be to benefit the public."

That regulated monopoly is in the interest of economy and good service and may be best obtained by state commissions was the effect of the decision in the case of *Idaho Power & Light Co. v. Blomquist*, 26 Idaho 222, 141 Pac. 1083, Ann. Cas. 1916E, 282: "Under these various utility acts, the commission is generally given power to regulate rates and fix a specific rate, instead of a mere maximum, and that took away the opportunity for rate cutting, one of the principal instruments of warfare between such corporations. Under the act in question, the commission is given power to fix the rate absolutely, and neither of the competing companies can charge more or less than the rate fixed. Under those conditions competition can amount to nothing, and the only reason for having two corporations covering the same field is to secure satisfactory service. But, under our utilities act, the commission is the arbitrator in regard to all matters of service. If the utility corporation is not giving satisfactory service, the commission has absolute power to compel it to do so. If its facilities are such that the cost of operation is unnecessarily high, the commission can enforce the installation of proper machinery and facilities and a correspondingly proper charge for the commodity furnished. The commission may force the public utility to keep abreast of the times in the employment of proper machinery and appliances in their plants and in the economic conduct of its business. If wasteful methods are indulged in, the public utility must bear the loss, and not the consumer. Thus the reason for competition is entirely taken away. The rate to be determined by the commission in each case is a reasonable rate—a rate fair to both the consumer and the supplier. If there are other methods or machinery that might be used in a plant that would

materially reduce the cost of production, the commission may direct the utility to install such machinery or appliances, and in case it refuses to do so, upon proper application, may issue a certificate of convenience and necessity to a utility corporation that will do so. * * * The city of Twin Falls has one company already serving it, and if another company is permitted to enter there will be two sets of poles and lines erected in said city, and it does not seem possible that any one would contend that where one company is amply able to serve the wants of the people, so far as electrical power is concerned, the interests of the public would require another system to cover the same ground, when there can be no cutthroat competition under the law. * * * It is conceded at the present time by the leading thinkers of the country upon this subject that the best method of arriving at a reasonable rate to be charged for such services can be better established by a public utility commission than by competition, especially that competition which must culminate in unregulated monopoly. If monopoly is to be regulated, it ought to be regulated in a way that equal justice may be done to all. The consensus of opinion at the present time clearly is that that object or purpose can be best achieved by public utilities laws similar to the one under consideration. * * * But if a public utilities commission can establish reasonable rates, both for the corporation and the users of its product, it will in the end be better for all concerned than cutthroat competition."

The case of Niagara Gorge R. Co. v. Gaiser, 109 Misc. 38, 178 N. Y. S. 156, P. U. R. 1921C, 636, stated the current reason for commission control in connection with the regulation of motor vehicles: "The legislature has clearly recognized the necessity of vesting in the public service commission authority to pass upon the question as to the convenience of and necessity for such competing lines, and the power to supervise and control their operation. Unless defendant has come under the jurisdiction of the public service commission, he may so operate that his competition will make plaintiff's operation impossible, because of the financial loss resulting, and thereby the service guaranteed to the public through the supervision of the plaintiff by the public service commission may be destroyed."

An excellent definition of the duties of regulation and control by state commissions in taking the place of competition was furnished in the case of Lima Tel. & T. Co. v. Public Utilities Comm., 98 Ohio St. 110, 120 N. E. 330, P. U. R. 1919A, 888, where the court said: "The public utilities commission is an administrative

governmental agency, with regulatory powers. Aside from its necessary police power to require safe and efficient service, its important function is to act as an arbitrator in the ascertaining and fixing of fair compensation to be paid to the utility without injustice to it or to the consumer. The condition which gave rise to the study and discussion of the general subject resulted from the fact that as substantially a monopoly privilege is granted to the utility company, competition being practically removed, the law of supply and demand can not operate in fixing rates and charges. Therefore the government, acting for the public, which granted the monopoly, must itself prescribe a method for arriving at a just compensation. While preventing the use of the essential advantages of the monopoly unfairly against consumers, it is equally important that justice be done the utility company, and that sufficient compensation be provided, and its continuance assured, to induce the investment of the capital necessary to the furnishing of the service. * * * It is equally apparent that where the concern to be valued is a public utility, which has practically a monopoly, the public—that is, the customers—have no choice. They are compelled to deal with the concern whether they wish to or not. The concern may or may not have the good will of the public with whom it deals, but this plays a very small part in the earning power of a company which is in the possession of a practical monopoly of the business. Therefore in such a case the element of good-will value is not a thing to be estimated as part of the capitalization upon which the public must pay a fixed charge. On the other hand, the value that results from the fact that the concern is in active operation, that the physical property, the buildings, the equipment and plant and capital, are all active, and together make a going concern, is a thing that must be taken into consideration.”

§ 908. State commissions first established.⁵—Massachusetts was the first state to adopt this commission form of regulation for municipal public utilities as a substitution for the control by competition, which must always be inefficient and unsatisfactory in the case of such natural monopolies, for as the court in *Weld v. Gas & Electric Light Comrs.*, 197 Mass. 556, 84 N. E. 101, decided in 1908, said: “In the first place, in reference to this department of public service, we have adopted in this state legislative regulation and control as our reliance against the evil effects of monopoly, rather than competitive action between two or more

⁵ This section (§ 610 of 2d edition) cited in *Idaho Power &c. Co. v. Blomquist*, 26 Idaho 222, 141 Pac. 1083, Ann. Cas. 1916E, 282.

corporations, where such competition will greatly increase the aggregate cost of supplying the needs of the public, and perhaps cause other serious inconveniences. * * * The state, through the regularly constituted authorities, has taken complete control of these corporations so far as is necessary to prevent the abuses of monopoly. Our statutes are founded on the assumption that, to have two or more competing companies running lines of gas pipe and conduits for electric wires through the same streets would often greatly increase the necessary cost of furnishing light, as well as cause great inconvenience to the public and to individuals from the unnecessary digging up of the streets from time to time, and the interference with pavements, street railway tracks, water pipes and other structures.⁶ * * * In reference to some kinds of public service; and under some conditions, it is thought by many that regulation by the state is better than competition."

This principle was established and fully recognized as constitutional and practical in this jurisdiction as indicated in the case of Attorney General v. Walworth Light &c. Co., 157 Mass. 86, 31 N. E. 482, 16 L. R. A. 398, decided in 1892, where the court said: "The legislature may think that a business like that of transmitting electricity through the streets of a city has got to be transacted by a regulated monopoly, and that a free competition between as many companies and persons as may be minded to put up wires in the streets, and to try their luck is impracticable. Without wasting time upon useless generalities about the construction of statutes, it is enough to say that the statute before us had that consideration in view, and must be construed accordingly."

§ 909. Police power as basis for regulation.—That the police power constitutes the basis for state regulation which, when properly availed of, may avoid the necessity for ownership by the municipality or the state is indicated in the case of State v. Superior Court of King County, 67 Wash. 37, 120 Pac. 861, L. R. A. 1915C, 287, Ann. Cas. 1913D, 78, decided in 1912, where the court said: "In its search for remedies and while seriously considering municipal, state or government ownership, the public, by reference to the police power of the state, has almost unwittingly—unwittingly in the sense that it is not generally appreciated—solved the problem, and has by the application of fundamental as well as established relative propositions of law gained every

⁶ Attorney General v. Walworth Light &c. Co., 157 Mass. 86, 31 N. E. 482, 16 L. R. A. 398.

advantage of ownership without assuming its burdens. From the time it was held to be within the police power of the state to control public service corporations to the extent of fixing rates, the natural sequences of that holding have followed with a rapidity which may seem to those who have been wedded to the theory that the government could not interfere in the use, or limit the earnings, of property devoted to public service and which was not put to an unlawful use, to be alarming."

The capacity of the state in the exercise of its police power to fix and regulate rates and control service was well stated in the leading case of *Union Dry Goods Co. v. Georgia Public Service Corp.*, 248 U. S. 372, 63 L. ed. 309, 39 Sup. Ct. 117, 9 A. L. R. 1420, as follows: "The presumption of law is in favor of the validity of the order, and the plaintiff in error did not deny, as it could not successfully, that capital invested in an electric light and power plant to supply electricity to the inhabitants of a city is devoted to a use in which the public has an interest which justifies rate regulation by a state in the exercise of its police power. *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. 468; *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 407, 58 L. ed. 1011, 1020, L. R. A. 1915C, 1189, 34 Sup. Ct. 612. Thus it will be seen that the case of the plaintiff in error is narrowed to the claim that reasonable rates, fixed by a state in an appropriate exercise of its police power, are invalid for the reason that, if given effect, they will supersede the rates designated in the private contract between the parties to the suit, entered into prior to the making of the order by the railroad commission. Except for the seriousness with which this claim has been asserted and is now pursued into this court, the law with respect to it would be regarded as so settled as not to merit further discussion. That private contract rights must yield to the public welfare, where the latter is appropriately declared and defined and the two conflict, has been often decided by this court. * * * These decisions, a few from many to like effect, should suffice to satisfy the most skeptical or belated investigator that the right of private contract must yield to the exigencies of the public welfare when determined in an appropriate manner by the authority of the state, and the judgment of the Supreme Court of Georgia must be affirmed."

That special contracts for service are subject to regulation by the public service commission in order to make rates for service uniform was clearly established and pointedly discussed as fol-

lows in the case of *Eagle-Pitcher Lead Co. v. Henryetta Gas Co.*, 112 Okla. 65, 239 Pac. 890, P. U. R. 1926A, 659: "Subsequently, the public service commission of the state of Washington finding that the light and water company's returns were not adequate, and that the lumber company was getting its water at a rate that was discriminatory, the commission without notice to the lumber company ordered the light and water company to charge and collect from the lumber company the regular schedule of rates for water. * * * Innumerable authorities are cited holding that commissions clothed with the power by the state legislature, such as the corporation commission of Oklahoma is vested with, have the power and authority to regulate and control the rates, increase or decrease the same, of all public utilities, and that such commissions are in nowise hampered or prevented from exercising such power and authority by reason of any contracts entered into by the parties concerned, either prior to, or subsequent to, the legislature creating the commissions and defining their powers and duties."

Under its police power, the state may regulate contracts for the supply of public utility power or service, because this directly affects rates for service to the consumer. This principle was established and discussed as follows in the case of *Market St. R. Co. v. Pacific Gas & Electric Co.*, 6 Fed. (2d) 633, P. U. R. 1926A, 509, where the court said: "This is a bill for an injunction, brought by the Market Street Railway Company, a corporation, against the Pacific Gas & Electric Company, a corporation, the railroad commission of the state of California, and its several members, constituting such commission, to restrain said defendants from interfering with plaintiff's rights under a certain written contract. In the year 1909, plaintiff's predecessor in interest, United Railroads of San Francisco, a corporation, was the owner of and engaged in the operation of a street railway system in that city. For the purpose of acquiring a constant, permanent, and reliable source of supply of electric energy, said United Railroads at that time entered into an arrangement for the formation of a corporation to be known as the Sierra & San Francisco Power Company, and for that company to furnish it with electricity. * * * The parties agreed upon an average net rate of seven and one-half mills per kilowatt hour to be paid for the power supplied over a term of forty-four years, commencing March 1, 1909, and the contract provided for a minimum annual quantity, which might in certain contingencies be increased. The power company was authorized to use or to sell to others surplus

power not required by the purchaser, subject to a first and preferential right of the latter to a supply adequate to its requirements. It was expressly provided that the contract should be binding as well upon the successors and assigns of the respective parties as upon the parties themselves. The power company's articles of incorporation conferred upon it complete powers to function as a public utility in the distribution of electric power. Its water rights, including those to which it succeeded, were acquired under notices of appropriation which specified that the hydroelectric energy to be generated by their use was to be distributed for public purposes. * * * In August, 1918, on account of abnormal increases in operating expenses, the power company applied to the railroad commission of California for authority to increase its electric rates, but specifically exempted its principal consumer, United Railroads, from such application, alleging that the contract rate would be commensurate with its increased costs of operation. The railroad commission, however, instituted on its own motion a new proceeding, in which it placed United Railroads in the same category as all other of the applicant's consumers. On October 22, 1918, increases were ordered on all rates, including those established by special contracts. At the hearing United Railroads expressed its willingness to support the power company under abnormal conditions, reserving, however, all of its contract rights. Subject to a stipulation that, in case it should sue for and recover any amount paid in excess of the rate provided by the contract, interest would be paid, United Railroads for a time acquiesced in the increased rate. On January 1, 1920, the power company leased for a long term of years to the Pacific Gas & Electric Company, a corporation, defendant herein, all of its property and rights, including those under the contract. Ever since said time said lessee has been in possession of the properties, and has supplied United Railroads (or its successor, plaintiff herein) with electric energy and power in accordance with the terms of the contract. On June 30, 1920, the railroad commission added a surcharge of fifteen per cent to the contract rate in an order based on the application of the Pacific Gas & Electric Company (hereinafter called the electric company) to increase all its rates. * * * On June 27, 1922, the electric company commenced suit against plaintiff in the superior court of the state of California, in and for the county of San Francisco. In January, 1925, judgment was ordered in favor of the electric company for \$420,925.44, a suit representing the differential between the rate named in the contract and that fixed by the railroad commission; the judge before whom the case was

tried filing a written opinion. Immediately thereafter, and before findings had been signed or judgment entered, plaintiff filed its bill in this court, and obtained an order temporarily restraining further prosecution of the state court suit.

"Plaintiff relies on article 1, section 10, of the Constitution of the United States (the 'contract' clause), and on section 1 (the 'due process' clause) of the Fourteenth Amendment, claiming also that the California Public Utilities Act (St. 1915, p. 161), and in particular section 67 thereof, is repugnant to and violates other provisions of the federal Constitution. It is averred that irreparable injury will result to plaintiff if defendant is not enjoined from enforcing its state court judgment, and that, unless by this court forbidden, defendant electric company will subject plaintiff to a multiplicity of suits to enforce orders of the railroad commission which have no application to it. More particularly, complaint is made (1) that a contract such as the one here involved can not be affected by the establishment by the railroad commission of general rates * * * and (4) that these orders are void, because the property of the power company had not been dedicated to public use prior to the execution of plaintiff's contract, and hence never was subject to public regulation so far as that contract was concerned. * * * With regard to the second preliminary contention, section 1722 of the California Civil Code requires that the subject of a sale be property, title to which can be immediately transferred from the seller to the buyer. This provision has not been construed to abrogate the common-law doctrine of potential possession. It seems obvious, however, that electrical energy which is to be generated in the future has not a potential existence in the normal sense of the term, and hence can not be termed property. * * * Hence it must be held that the contract of 1909 was not a sale of electricity in praesenti, but what in Civil Code, section 1730, is called an agreement for sale, and that it created no interest either in real or personal property. On the question of the power of the state to regulate the contracts of its public utilities with their consumers the law is now well settled. "The courts hold that all contracts relating to public service, entered into between the corporation operating a public utility and the private consumer, contain from the very nature of their subject-matter an implied reservation of the right of the state to lawfully exercise its police power for the general welfare, and that there is no impairment of the obligations of contract within the guaranties of the state or federal Constitution, even though said contract is thereby rendered par-

tially or wholly invalid.' In re Guilford Water Company's Service Rates, 118 Maine 367, 108 Atl. 446, 450; Union Dry Goods Co. v. Georgia Public Service Corporation, 248 U. S. 372, 376, 39 Sup. Ct. 117, 63 L. ed. 309, 9 A. L. R. 1420."

Under their police power in order to avoid discrimination in rates, the railroad commissions may regulate special contracts for service and make them conform to the rates charged for like service to noncontract consumers, and their action in doing so will be sustained by the courts, because such a power comes clearly within that of the commissions, as was indicated in the case of Sutter Butte Canal Co. v. Railroad Commission, 279 U. S. 125, 73 L. ed. 637, 49 Sup. Ct. 325, where the court spoke as follows: "The canal company is a public utility subjected by law to the power and direction of the state railroad commission and is in possession of a water right dedicated to the public use. Its consumers are divided into two classes—contract consumers and noncontract consumers. * * * The commission said: 'Rates fixed herein will, therefore, be on the basis that all service be charged for under a uniform schedule of rates and under application forms which will exclude any consideration of the continuous contract and preclude the making of charges for unirrigated lands under such contracts, as such.' In view of the finding of the Supreme Court that the record does not disclose any substantial evidence which would impeach the findings of the railroad commission upon the subject of a fair rate base and a proper return to the company, with which we agree, our decision will be limited to a consideration of the charge that the decision here under review is a violation of the Fourteenth Amendment by taking away from the company its contract rights, and depriving it of payment to it for water service for all the lands which, under the original contract, the landowners were to pay for, whether the water was used or not. * * * Without now affirming or denying all that is claimed for them, we think that the * * * clauses from the constitution and statute are sufficient to subject the contracts in question to the regulating action of the commission upheld by the decision under review. * * * The only provision of the contract which had not been theretofore modified by the commission or the court was the one with respect to the duration of the contract. As the contract was necessarily made in view of the power of the commission to change its terms to avoid discrimination in dealing with the consumers of water of a public utility, it is very difficult to see why the situation may not be reduced to a uniform one under the

power of the commission, if that body deems it equitable and fair to do so in the interest of the public. The record shows with much clearness the complicated situation that must continue unless the duration of the obligations of the so-called contract and noncontract consumers be made the same. This change would seem to be well within the police power, subject to which these contracts were made, and there is no such difference between the fixing of rates and the modification of the duration of a contract as would prevent the application of the police power to the one and not to the other. There are a number of authorities that leave no doubt that such an exercise of the police power under the Constitution of 1879 must be sustained. * * * Those who made these contracts for water made them subject to the power of the commission to change them for the benefit of the public, and that is all that has been done in this case by the commission's order. * * * But the decision of the Supreme Court of the state is conclusive on us as to the interpretation of the order, that being a state question; and counsel for the commission announced at the bar that the commission regarded that decision as binding on them. Thus, it is apparent that an independent interpretation by us of the commission's order can not and ought not to be attempted."

§ 910. **Scope of activity of business requires state commissions.**—That many municipal public utilities are interurban or even interstate in their operations, thereby necessitating either state or interstate rather than municipal regulation, was well expressed in the case of *Texarkana v. Southwestern Tel. & T. Co.*, 48 Tex. Civ. App. 16, 106 S. W. 915, decided in 1907, where the court said: "When we consider the nature of the business of telegraph and telephone lines in this busy commercial age, we have a most cogent reason for the legislature declining to commit to the arbitrary control of the municipalities throughout the state the use by such companies of the public streets and alleys. These companies are not primarily of local concern, affecting only the inhabitants of the towns and cities through which they pass, but they essentially concern the public at large, in that they furnish quick and cheap means of communication between all points throughout the country, by which a very large percentage of the business of the country is transacted. In other words, the business is such a one as calls for the exercise of state regulation rather than the delegated power of municipal control."

In the interest of the public and especially of the consumer, the necessity for state regulation of the service and of such a

method of regulation as the one proposed to insure its being fair and reasonable, were indicated by the case of Consolidated Gas Co. v. Mayor, 146 Fed. 150, decided in 1906, where the court said: "A corporation which undertakes, for its own emolument, to supply gas to the inhabitants of a municipality under charters and franchises from the state which allows it to embark in such industry, and invite its stockholders to invest their money therein, is engaged in what is called a 'public service' or a 'public utility,' and therefore is under the supervision, inquisition, and regulation of the state as to the manner in which it conducts its business. If, untrammelled by competition, it charges a price far above all reasonable cost to the helpless consumer, who must pay that price or go without, while it receives an exorbitant return on such of its property as is invested in the enterprise, the state may step in and reduce that price to such sum as will, taking everything into consideration, be a reasonable return upon what has been adventured in the enterprise on the faith of the state's franchises. No one disputes this proposition. But in fixing such price the state should itself be fair and reasonable—should certainly stop short of confiscation."

That the municipality has not the necessary jurisdiction to regulate the public utility which operates beyond its territory and within that of several municipalities, none of which has the ability or the capacity adequately to regulate and control the service and the rate to be charged for it, was held in the case of South Pasadena v. Los Angeles Terminal R. Co., 109 Cal. 315, 41 Pac. 1093, decided in 1895, where the court said: "One of the limitations upon such ordinances is that they can have no extra territorial force unless by express permission of the sovereign power. In the nature of things, this must be so unless intolerable confusion and evil is to result; and the constitution of the state, recognizing the necessity for such a restriction, has provided (article 2, section 11) that 'any county, city, etc., may make and enforce within its limits all such local, * * * and other regulations as are not in conflict with general laws.' Here was a road lying partly within the confines of at least three municipalities—Los Angeles, South Pasadena, and Pasadena. Conceding the right of plaintiff to impose a limitation on the charges to be made for passage between stations within its limits and stations elsewhere, then the other cities named have, or might have, the same right."

The purposes of public utility commissions are adequately defined in the case of *People v. Willcox*, 207 N. Y. 86, 100 N. E. 705,

45 L. R. A. (N. S.) 629: "That law was enacted in response to a pronounced and insistent public opinion, and was a radical and important modification of the relations and policy of the people toward the corporations, which are its subjects. Its paramount purpose was to protect and enforce the rights of the public. It made the commissions the guardians of the public by enabling them to prevent the issue of stock and bonds for other than statutory purposes, or in appreciable and unfair excess of the value of the assets securing them, and to prevent, also, unneeded or extortionate competition, or indifferent and unaccommodating methods of operation, or oppressive or discriminating charges or rates. It provided for a regulation and control which were intended to prevent, on the one hand, the evils of an unrestricted right of competition, and, on the other hand, the abuses of monopoly."

The broad powers and extensive scope of the jurisdiction of public utilities commissions were forcibly stated by the court in the case of *People v. McCall*, 219 N. Y. 84, 113 N. E. 795, Ann. Cas. 1916E, 1042, as follows: "The court at the appellate division did not therefore have the power to determine that the extension of the relator's gas mains and pipes ordered by the public service commission was unreasonable in the sense that it was an unwise or inexpedient order, but only that it was unreasonable if it was an unlawful, arbitrary, or capricious exercise of power.

* * * The court at the appellate division substituted its own judgment for that of the public service commission in determining that the latter's order was unreasonable. This decision, if allowed to stand, will seriously hamper the commissions in the discharge of their duties, and go far toward defeating the efforts of the legislature to establish agencies to regulate the great public service corporations."

In affirming this decision the United States Supreme Court said in state of *New York v. McCall*, 245 U. S. 345, 62 L. ed. 337, 38 Sup. Ct. 122, P. U. R. 1918A, 792, that: "The court of appeals of New York decided that the public service commission was created to perform the important function of supervising and regulating the business of public service corporations; that the state law assumes that the experience of the members of the commission especially fits them for dealing with the problems presented by the duties and activities of such corporations; that the courts, in reviewing the action of the commission, have no authority to substitute their judgment as to what is reasonable in a given case for that of the commission, but are limited to de-

termining whether the action complained of was capricious or arbitrary and for this reason unlawful; and that it was clearly within the power of the commission to make the order which is here assailed. This interpretation of the statutes of New York is conclusive, and the definition, thus announced, of the power of the courts of that state to review the decision of the public service commission, based as it is in part on the decision in *Interstate Commerce Commission v. Illinois C. R. Co.*, 215 U. S. 452, 470, 54 L. ed. 280, 287, 30 Sup. Ct. 155, differs but slightly, if at all, from the definition by this court of its own power to review the decisions of similar administrative bodies, arrived at in many cases in which such decisions have been under examination.

* * * Corporations which devote their property to a public use may not pick and choose, serving only the portions of the territory covered by their franchises which it is presently profitable for them to serve, and restricting the development of the remaining portions by leaving their inhabitants in discomfort without the service which they alone can render. To correct this disposition to serve where it is profitable and to neglect where it is not is one of the important purposes for which these administrative commissions, with large powers, were called into existence, with an organization and with duties which peculiarly fit them for dealing with problems such as this case presents, and we agree with the court of appeals of New York in concluding that the action of the commission complained of was not arbitrary or capricious, but was based on very substantial evidence, and therefore that, even if the courts differed with the commission as to the expediency or wisdom of the order, they are without authority to substitute for its judgment their views of what may be reasonable or wise."

That the tendency is toward state control because the scope of the activities of many public utilities is state wide and that the federal courts will not disturb the decisions of the state courts on this question were clearly indicated in the case of *Pawhuska, Oklahoma v. Pawhuska Oil & Gas Co.*, 250 U. S. 394, 63 L. ed. 1054, 39 Sup. Ct. 526, P. U. R. 1919E, 178: "In 1913 the state legislature adopted an act providing that the corporation commission 'shall have general supervision over all public utilities, with power to fix and establish rates and to prescribe rules, requirements and regulations, affecting their services.' Laws 1913, chapter 93, section two. It was under this act, and after a full hearing on a petition presented by the gas company, that the order in question was made. The order abrogates all flat rates,

increases the meter rates, requires that the gas be sold through meters to be supplied and installed at the company's expense, and recites that the evidence produced at the hearing disclosed that the franchise rates had become inadequate and unremunerative, and that supplying gas at flat rates was productive of wasteful use. On an appeal by the city, the Supreme Court of the state affirmed the order. 64 Okla. 214, P. U. R. 1917F, 226, 166 Pac. 1058. The city contended in that court—and it so contends here—that at the time the franchise was granted it alone was authorized to regulate such charges and service within its municipal limits; that the legislature could not transfer that authority to the corporation commission consistently with the constitution of the state; and that, in consequence, the act under which the commission proceeded and the order made by it effected an impairment of the franchise contract between the city and the gas company, in violation of the contract clause of the Constitution of the United States. * * * Dealing with this contention the state court, while fully conceding that the earlier statute delegated to the city the authority claimed by it, held that this delegation was to endure only 'until such time as the state saw fit to exercise its paramount authority'; that under the state constitution the legislature could withdraw that authority from the city whenever, in its judgment, the public interest would be subserved thereby; and that it was effectively withdrawn from the city and confided to the corporation commission by the Act of 1913. The claim that this impaired the franchise contract was overruled. It is not contended—nor could it well be—that any private right of the city was infringed, but only that a power to regulate in the public interest, theretofore confided to it, was taken away and lodged in another agency of the state,—one created by the state constitution. Thus the whole controversy is as to which of two existing agencies or arms of the state government is authorized for the time being to exercise in the public interest a particular power, obviously governmental, subject to which the franchise confessedly was granted. In this no question under the contract clause of the constitution of the United States is involved, but only a question of local law, the decision of which by the Supreme Court of the state is final."

§ 911. **Abandonment of service.**—Where the public interest would be seriously affected by the abandonment of public utility service, the policy is not to permit this to be done, so long as the public utility is operating its system as a whole at a profit. In some jurisdictions the question is determined by the public util-

ity commission, whose action will be sustained, if reasonable, in view of the expense and the necessity for such continued service, while in other jurisdictions the matter is left to the decision of the courts. And where there is no statutory authority provided, the courts generally determine the matter, because the power of the commission is necessarily fixed by the statutory provisions creating it. This principle is announced and discussed as follows in the case of *Rutland R., Light &c. Co. v. Rutland*, 98 Vt. 385, 127 Atl. 882, where the court said: "It follows that, since the commission could not relieve the company of its duty respecting the maintenance of its track area, the commission was without jurisdiction to relieve it from the performance of the order.

* * * Nor did it have jurisdiction to authorize the requested discontinuance of the operation of the specified part of the railroad. The company was seeking permission to abandon that portion of its lines. Authority to grant such permission has not been conferred upon the commission, which possesses only such powers as are conferred upon it by express legislative grant, or such as arise therefrom by implication as incidental and necessary to the full exercise of the powers granted. *Bosquet v. Howe Scale Co. et al.*, 96 Vt. 264, 120 Atl. 171; *In re James*, 97 Vt. 362, 123 Atl. 385."

Since a public utility service is considered as a system, unprofitable portions of the service should not be abandoned where a substantial section of the territory served would be left without service, and the cost of continuing to give it would not be an unreasonable requirement of service on the system as a whole. This principle is established and discussed as follows in the case of *Ft. Smith Light & Traction Co. v. Ward*, 169 Ark. 519, 275 S. W. 757: "The testimony shows, however, that, while the proposed improved road is desirable, the route thereof is not the only one available, and that if it were built it could not supply the loss of street car service to the many people who do not own automobiles. In the former case the track had been used for twenty years, while in the instant case it was used only about eight years. But in this case, as in that, the track is not a mere lateral but is an extension of the main line. * * * It appears that more than one hundred and fifty men are employed in this plant, only a few of whom own automobiles. It also appears that an addition known as the Rea addition had been opened up at the end of this line, and that a number of people had bought or built homes there who worked in Ft. Smith, and that in doing so they had relied on the street car service to provide means of going to

and returning from Ft. Smith where they were employed, and that these people could not reside there and work in Ft. Smith if the service were discontinued. The trial court found, and the testimony supports the finding, that the part of the track sought to be abandoned is only one and eight-hundredths miles in length, and is a part of the street railway system of Van Buren, and should be treated as such, and that a sufficient showing was not made to justify the company in abandoning the unprofitable portion thereof."

Where, however, the property has been so far dismantled that it would be impracticable to reestablish it and resume the service, the courts will permit the service to be abandoned, as was indicated in the case of *Travis v. Public Utilities Comm.*, 123 Ohio St. 355, 175 N. E. 586, P. U. R. 1931D, 106, where the court said: "The real issue is whether or not the passenger and freight service of the railway company shall be abandoned or continued. It fairly appears by this record, and the evidence submitted, that the property has already been so far dismantled that it is wholly impractical to have the same reestablished and service resumed."

Although the consent of the commission is required and the public utility does not have the power or authority to discontinue service without such consent, the court will not compel it where conditions would justify its discontinuance, and the commission would have been obliged to give its consent, although the company failed to secure it before it discontinued the service. This principle and its application to the particular state of facts were discussed as follows in the case of *State v. Missouri, Kansas & C. R. Co.*, 117 Kans. 651, 232 Pac. 1038, where the court said: "The legislature has expressly provided that utilities can not change any rate, rule, regulation, or practice without the consent of the commission, and however unprofitable the business may have been at Strawn, the defendants had no right to ignore the provisions of law respecting a change of practice or a discontinuance of service. The defendants are corporations, creatures of the law, and have no powers except such as are granted by law, and therefore have no excuse for flouting the law under which they exist and operate. * * * That part of the business which was intrastate may be said to be almost insignificant in amount and the compensation for handling this business far exceeds the expense of maintaining the same. The defendants, of course, can not be required to carry on the business at a loss. * * * Under the circumstances an order compelling the service demanded would be unreasonable and confiscatory. * * * Fol-

lowing the practice in *State ex rel. v. Southwestern Bell Telephone Co.*, 102 Kans. 318, 170 Pac. 26, L. R. A. 1918E, 299, we have concluded that such a duplication of effort would not serve any good purpose. There, as here, a telephone company discontinued a public service without the consent of the commission. The matter was brought to the attention of the commission, where a full hearing was had and a decision made. When a mandamus proceeding was brought it was held that, it having been shown that the consent of the commission must have been granted if it had been asked, the restoration of the service would not be compelled by mandamus."

Where continued service after the expiration of its franchise, may be required of a public utility by statutory authority vested in the state commission, and the statute expressly forbids a withdrawal of such service without the consent of the commission, so long as the company continues to render service in any part of the state, the public utility may not discontinue its service without such consent, or resort to the federal courts for relief after it has invoked action by the authorities or courts of the state under the statutes of the state, for as the court said in the case of *United Fuel Gas Co. v. Railroad Comm. of Kentucky*, 278 U. S. 300, 73 L. ed. 390, 49 Sup. Ct. 150, P. U. R. 1929A, 433: "Section 23 of the Statutes of Kentucky, chapter 61, Acts of 1920, p. 250, subjects any public service company which has continued its service after the expiration of its franchise to the jurisdiction and authority of the railroad commission, and forbids it to withdraw such service without permission of the commission so long as it remains in business in any part of the state. It is said that the action of the commission under this statute in effect operates as a renewal of the franchise of appellants in the cities named in a manner not in conformity with the provisions of the state constitution. But this objection, and that as well to the constitutionality, on state grounds, of the statute creating the commission and defining its powers, are not available to appellants in the present suit. It is the rule of this court, consistently applied, that one who has invoked action by state courts or authorities under state statutes may not later, when dissatisfied with the result, assail their action on the theory that the statutes under which the action was taken offend against the Constitution of the United States. * * * Assuming, as we do for present purposes, the authority of the commission under state law to refuse its permission to appellants to withdraw, we perceive no objection under the federal Constitution or otherwise, to withholding it. Appellants do not seriously deny that the

Warfield Company is but an agency organized by the United Company for the purpose of carrying on its public service business in Kentucky, or that through that agency the latter is doing business in the cities named and elsewhere in the state. In these circumstances its continuance in those cities is neither forbidden nor illegal. It remains subject to state regulation and control of it is, by state statute, vested in the commission with statewide authority. If a state may require a public service company subject to its control to make reasonable extensions of its service in order to satisfy a new or increased demand, present or anticipated, obviously the latter may be compelled to continue to use present facilities to supply an existing need so long as it continues to do business in the state."

Public service commissions frequently have express statutory authority to grant or withhold from public utilities the right to abandon their service absolutely or on condition, and, while the municipality may not be bound to grant a street railway company a franchise to render bus service in lieu of abandoned street car service, where the order of the commission provides this as a condition of abandoning the street car service, the municipality may take advantage of it and generally should in the interest of the public convenience, for as the court said in the case of *State v. Public Service Comm. (Mo.)*, 50 S. W. (2d) 114: "That it is within the powers and jurisdiction of the public service commission, under the powers granted that body by the legislature, to grant to or withhold from a street railroad the right and power to abandon a part or spur of its existing line, has been repeatedly held by this court. *Southwest Missouri Railroad Co. v. Public Service Commission*, 281 Mo. 52, 219 S. W. 380; *State ex rel. v. Missouri Southern R. R. Co.*, 279 Mo. 455, 214 S. W. 381; *State ex rel. Carthage v. Public Service Commission*, 303 Mo. 505, 260 S. W. 973; *City of Cape Girardeau v. Railway Co.*, 305 Mo. 590, 267 S. W. 601, 36 A. L. R. 1488. The power of the public service commission is an exercise of the police power of the state granted by the law-making power to that tribunal and overrides all contracts, privileges, franchises, charters, or city ordinances. The exercise of such police powers are by the statutes granting same made subject to review and control by the courts as to being unreasonable or unlawful. * * * The commission could have granted the right to abandon the street car service without providing for the substituted bus service, but it also had a right in granting the privilege of abandoning street car service to do so conditionally, and to this end imposed on the operating company

the burden of inaugurating and maintaining motorbus service. We grant that the city has the right to refuse the use of its streets for such motorbus service, or to arrange with some other company or individual to furnish transportation facilities, in which case the commission may by further order relieve the St. Louis Public Service Company of this burden or privilege."

§ 912. **Business policies.**—Matters concerned with the management of a public utility company and of its business policies in most cases are properly left to the company for its own decision, and unless rates or the service is directly affected to the detriment of the public interest, the internal business management should be left under the control and direction of the company, because it is responsible for the results and should be allowed freedom of action and given discretion in the decision of matters of business policy so long as the service is satisfactory and the rates remain reasonable. The power of the commission and the proper limitations on its authority in such matters were discussed at length in the case of *Chippewa Power Co. v. Railroad Commission*, 188 Wis. 246, 205 N. W. 900, where the court said: "In the course of time it was demonstrated that this mode of regulation and control was impracticable, and in its place public bodies like the interstate commerce commission and railroad commissions were created as governmental agencies, with administrative powers to determine certain facts, which facts became operative when so found, pursuant to a standard lawfully created by the law-making bodies. But it must always be borne clearly in mind that these agencies possess neither judicial nor legislative functions, nor could they under our constitutions be invested with any such powers; nor were they invested with any power whatsoever as far as public utilities are concerned, excepting such as touched the public interests. This thought is at the very foundation of public regulation and public control, and must serve as a perpetual warning that 'thus far shalt thou go, but no farther.' The line has thus been definitely drawn, and definitely fixed. * * * As already indicated, a public utility in the performance of its functions has a dual aspect. The interests of the public are guarded by the commission. The interests of the stockholders are primarily represented by the officers and directors of the corporation. Notwithstanding the regulation involved in the Public Utility Act, the company itself is a concern not organized for public, but for private, profit, which means the profits of the stockholders. It has been the experience with all such corporations that as a rule the interests of the stockholders

are adequately protected and represented by the officers and directors. * * * If the amount of the rental is unreasonable and exorbitant, the principal burden rests upon the stockholders; and in order to make good on, or save their holdings, it would be incumbent upon them to see that their interests are properly represented, or otherwise suffer the consequences. * * * The complaint alleges an attempt on the part of the commission to control the rentals in the lease, or to approve or disapprove of the lease and the terms and conditions thereof. This, as has already been shown, it can not do."

Since the power of the commission is limited to the express provisions of the statute creating it, it has no authority to authorize or regulate the issuance of securities of an interstate public utility where the proceeds of the securities are required for additional equipment and capital, which are to be used entirely outside of the state, for as the court said in the case of *Great Lakes Stages v. Public Utilities Comm.*, 120 Ohio St. 491, 166 N. E. 44, P. U. R. 1929E, 228: "The sole legal question to be determined is whether the public utilities commission of Ohio has jurisdiction to pass upon the issue of securities of an interstate public utility when the proceeds from the sale of such issue are to be used to provide additional equipment and working capital to be used outside of the state. * * * Since the public utilities commission can not compel the plaintiff in error to apply to it for authority to issue this stock, it can not be forced by voluntary application to authorize the issue. We agree that the commission has no jurisdiction to pass upon the issuance of stock under the circumstances set forth in this record."

While the commission, acting under proper statutory authority, has the power to require the installation and maintenance of stations for furnishing its service, reasonably necessary for the public convenience and not unjustly burdensome to the public utility, the commission can not fix the exact location or require the removal of stations in a community from one location to another, especially where the public service is being properly provided, for, as the court said in the case of *State v. Western Union Tel. Co.*, 96 Fla. 392, 118 So. 478, P. U. R. 1929A, 252: "Inspection of these provisions of the law can leave no doubt that the railroad commission is clothed with power to regulate telegraph companies. * * * Whether or not the regulation or the service required is fair, just, reasonable, and sufficient, and reasonably necessary for the public convenience, and not unjustly burdensome to the company, must be determined by facts in the par-

ticular case, and is subject to review by the courts. * * * In the matter of installing telegraph stations, the statute (section 4406, Revised General Statutes of Florida) in effect provides that the railroad commission shall have power to require their installation and maintenance, where reasonably necessary for public convenience, if not unjustly burdensome to the company. There is nothing in the statute which authorizes the commission to point out the exact location or point in the community where the telegraph station shall be located, or to require the removal of such station from one location in the community to another. * * * It is not alleged or attempted to be shown that any peculiar or unusual conditions exist at Apopka that would, in the interest of public convenience, demand additional or different telegraph service from that already provided."

Where the matter is concerned directly with the proper service which the public utility may be required to furnish, the public service commission has the power and the duty to require such reasonable arrangements as to equipment and maintenance as are necessary to secure satisfactory service at the most reasonable rate and cost which may be made available to the company. This principle is enunciated and discussed as follows in the case of *Huntington Development & Gas Co. v. Public Service Comm.*, 105 W. Va. 629, 143 S. E. 357, P. U. R. 1929A, 168: "It further appears from the testimony offered on behalf of the gas company, before the public service commission, that the complainant's gas lines were in a bad state of repair, and the conditions under which the service was rendered made it necessary that new lines be constructed, both because of the inadequacy of the present ones and their present state of deterioration. The cost of such new lines was estimated to be \$19,000. On the other hand, the commission's engineers reported that the extension lines were in a fair state of repair comparable to nonstandard lines in other like sections of the state. However, they recommended that the individual meters on the complainants' service lines should be moved to a point where the service lines connect with the complainants' main line. The commission's engineers were further of the opinion that the meters could be so moved and the gas lines completely rehabilitated by the expenditure of \$750. * * * Consequently it is in respect to that service subject to the commission's power of regulation, which, in the exercise thereof may disregard any contract deemed to be at variance with the needs of the service as determined by it, or which is discriminatory in character. Volume 1, Spurr on Guiding Principles of Public Serv-

ice Regulation, pp. 111, 112; section 23, c. 15-O, of the Code. But is this contract at variance with the needs of the service, or is it discriminatory in character? We are inclined to believe not. Under the original agreement entered into in 1920, the Four Pole Gas Company (by this designation we refer to Topping and his seven associates; the consumers subsequently tapping its lines did not become members of the company), agreed to build, maintain, and keep in repair its extension line. And it was, under the circumstances, but reasonable for the gas company to require that this should be done. * * * Likewise, as between the Four Pole Gas Company and the defendant gas company, the former was under a duty to see that the Sixteenth Street Gas Company kept its line in repair. * * * It merely fixed the obligation which the Four Pole Gas Company would incur for not maintaining its line in a proper state of repair, which obligation was to end upon the satisfactory reconditioning of the extension. Thus it is apparent that this contract was not an attempt to discriminate between the individual consumers on the Four Pole Gas Company's line, nor to interfere with the commission's power to regulate the service furnished. The evidence discloses that, after this subsequent contract was entered into, the gas company adopted a policy of refusing to install meters or to read them. Such action was not warranted by the contract of 1924, and was in violation of the prior (1920) agreement between the parties. * * * As the gas company in furnishing this service comes under the regulation of the public service commission, that body may, not as enforcing specific performance of the contract, but as a reasonable regulation, require the gas company to install and read the meters as set out in its order."

The policy of forcing prices by governmental action, by way of controlling the supply or stimulating the demand and the making of private contracts for such purposes, will not be sustained by the courts and such action by the commission will be set aside as unreasonable and beyond its powers, as is indicated in the case of *MacMillan v. Railroad Commission*, 51 Fed. (2d) 400: "This policy of the artificial forcing of prices by governmental action in cooperation with those in the oil industry interested in raising prices, by either stimulating demand or keeping supply in bounds, has never been attempted in this state by the legislature itself; on the contrary it has heretofore not only not established such policy, but has forbidden, by positive penal laws, the application of such artificial stimuli through private concert and agreement. * * * In short we believe that the orders in question

are unreasonable and void as to plaintiffs because issued in the attempted exercise, not of delegated, but of usurped power."

Where the commission has determined by sufficient investigation the necessity of requiring the separation of the lines of public utilities farther apart in order to avoid induction troubles, its order will be sustained by the court as being reasonable and necessary, for as the court said in the case of *Postal Telegraph-Cable Co. v. Railroad Commission*, 197 Cal. 426, 241 Pac. 81, P. U. R. 1926B, 22: "After much experimentation, investigation, and many negotiations and discussions, the commission was forced to the conclusion that there was but one practicable, reasonable solution of the question which would afford petitioner relief from induction troubles, to wit, a wider horizontal separation of the pole lines of the respective companies. The soundness of its conclusion is not questioned. Neither is the right of the commission to compel the petitioner to relocate its lines challenged. * * * In making its order the commission was acting within the limits of the police power of the state, and, as neither company had a vested right to remain where it was located as against the public's welfare, safety, and convenience, its order directing a greater horizontal separation of two dangerous agencies was properly made."

While the commission may not regulate the rate which a hotel may charge its guests for telephone service within the hotel, it has the power to fix the rate for outside service, because this is public, and the action of the commission in doing so will be sustained if the charge is reasonable, for as the court said in the case of *Hotel Pfister v. Wisconsin Tel. Co.* 203 Wis. 20, 233 N. W. 617: "We are of opinion that the statute under its terms and the construction given by the cases cited authorizes the commission to fix the five-cent rate for the use of public phones, and also authorizes the commission, pursuant to its power to regulate and supervise, to require disconnection with a hotel or other keeper of a public phone unless the hotel or other keeper shall conform to the rates lawfully fixed by the commission. The plaintiff contends that the defendant has no right to disconnect its system from the hotel because the hotel is not a public utility, and the railroad commission is therefore without power to regulate the charge for the service the hotel renders to its guests over its private system. It is quite true, of course, that the hotel is not a public utility. But, even so, it may like any other corporation or private person be the agent of the company in aiding it to perform its service to the public. The recital in the contract that

the payments by the company to the hotel are 'as commission' bears out this idea of the relations between the parties. The commission only concerns itself with the public telephone service performed by the hotel, as distinguished from the service to its guests performed through its private system. There is no attempt to regulate the charge the hotel may make to its guests for the intra-hotel service it performs for them. * * * The ten-cent charge limited to outside calls affects only such guests as make use of the company's system maintained for the use of the public. Such charge is a charge for public service. We can not better state our view than it is stated in the opinion of the railroad commission in the cases referred to, where it is said that the hotel system, in rendering the service in connection with outside calls, 'is but an extension of the telephone company's system as far as the former is used to furnish telephone service to the public in connection with the latter. In such connection the stations in the rooms of the hotels are as much pay stations as those located in the company's booths in the hotel lobbies.' * * * The company can not 'perform a service indirectly for the public, or any part thereof, which will result in the public being obligated to pay more for such service than could be demanded if the company performed it directly and entirely by means of its own facilities. If such practice were permitted, it would open the door to discrimination, and thereby afford a means of evading one of the most important provisions of the statute and render it impotent to accomplish the purpose of its enactment.' Wis. R. R. Comm. Rep., vol. 5, p. 689, *supra*. The commissions or boards of other states that have considered the precise or similar matters have uniformly held as held by our own commission. *Connoley v. Burleson*, N. Y., P. U. R. 1930C, 243; *In re Hotel Marian Co.*, Ark. Corp. Comm., P. U. R. 1920D, 466; *Re Hotel Tel. Ser. & Rates*, Mass. P. S. Comm., P. U. R. 1919A, 190; *In re Hotel Sherman Co. v. Chicago Telephone Co.*, Ill., P. U. C. 1915F, 776. No court decision upon a similar matter has been called to our attention."

That the commission must determine the present value of the public utility in order to establish the correct rate base, but may not substitute its judgment for that of the public utility as to operating expenses, unless there is a clear abuse of discretion by the officers of the company, was established and discussed as follows in the case of *Citizens Gas Co. v. Public Service Comm. of Missouri*, 8 Fed. (2d) 632: "'And we concur with the court below in holding that the value of the property is to be determined as of

the time when the inquiry is made regarding the rates.' If the property which legally enters into the consideration of the question of rates has increased in value since it was acquired, the company is entitled to the benefit of such increase. * * * The testimony, on behalf of the defendant commission, showed that its engineers made all their appraisals upon a basis of original cost. This allowed nothing for current prices. This method would be unfair to the public if prices had declined, and unfair to the company if prices had advanced. In view of the methods employed in such appraisal, the court must reject all the evidence offered by the commission to sustain its valuation of the utility properties. * * * The item of \$40,000, given as 'value old plant amortized,' should not be allowed. Complainant received its franchise by an ordinance of the city of Hannibal, approved July 5, 1910. * * * The old site, in the absence of testimony to the contrary, would stand as an offset to the new. * * * The percentage of depreciation used by the company's engineers was thirteen and four-tenths per cent and seems reasonable. The amount of working capital, etc., fixed by the company at \$40,000, may be accepted as proper for all of the purposes of this review. * * * The difference between the parties is so small that little need be said; seven and six-tenths per cent is conceded, whereas eight per cent is demanded. Upon the record here, no reason appears why the judgment of the public service commission should not be accepted and be controlling, as a rate of return less than this has in a number of cases been permitted to stand as reasonable and fair. In the matter of the operating expenses no comment need be made. So far as the record here shows, such expenses are reasonable. * * * The commission is not the financial management of the corporation, and is not empowered to substitute its own judgment for that of the directors of the corporation. There is no evidence of an abuse of discretion by the corporate officers in the matter of expense."

In matters of business policy, the judgment of the officers of the public utility as to salaries paid, and other questions of business management are generally left to the officers, but where the item is not large enough to affect the rates, the court will not set aside the finding of the commission where the rates appear to be reasonable, because it eliminated some items of salaries. While sustaining the action of the commission, the court indicated that if experience proved this was unreasonable, the company might petition for a modification of the order. This principle was established and discussed as follows in the case of Mul-

lendore Gas Co. v. Stillwater, 120 Okla. 140, 250 Pac. 895, P. U. R. 1927C, 49: "An examination of the record shows very clearly that the commission, as well as the expert witnesses, both of the gas company and the commission, proceeded upon the theory that the reproduction value as of the time of the hearing was the most important element to be considered in arriving at a correct conclusion as to the present fair value for rate-making purposes.

* * * The commission endeavored to find the cost of reconstruction of this plant, and at what price the pipe could be purchased at or about the time of the hearing, in order to arrive at the present value of the property. * * * The commission found in its order, and there is no dispute in the evidence as to the fact, that the gas plant involved in this case is in successful operation, and therefore the commission was not required to set aside a definite sum as the measure of going value. * * * We do not think the action of the commission in eliminating a part of the salaries of the general officers of the companies, even though erroneous, is of sufficient magnitude to affect the result finally reached by the order complained of. * * * It thus appears that if the rate of thirty-six cents per thousand cubic feet for the first 50,000 cubic feet per consumer per month, as fixed by the order of the commission, is shown by actual application to be confiscatory as contended by counsel for the gas company, nothing in the order appealed from will prevent it from making an application to the commission to increase the rate. While it is true that any inadequate rate confiscates the property of the utility, it is equally true that, by the same rule of law, an excessive rate confiscates the property of the patron. But, on the record before us, we are unable to say that the rate prescribed by the orders of the commission will have the effect of denying to the gas company a reasonable return upon its investment. We conclude that the order of the corporation commission appealed from is supported by the evidence, and that the same is reasonable and affords a fair basis for the earning of a reasonable return upon the investment in the property actually used in the public service in the city of Stillwater."

While a public utility may deal in articles of merchandise as a matter of encouraging and increasing its business, it may not require, as a condition of rendering its service, that its customers shall pay a charge for such equipment as is generally found in supply and department stores. Such a charge is an arbitrary and unreasonable requirement which the courts will not sustain, as

was indicated in the case of *Consumers Sanitary Coffee &c. Stores v. Illinois Commerce Comm.*, 348 Ill. 615, 181 N. E. 411, where the court said: "The statute is in derogation of the common law, and nothing is to be read into it by intendment. Whether or not a public utility may deal in articles of merchandise, and make a charge therefor is not an issue here. The question is whether, in fixing rate 'A2' for such consumers as are embraced within its purview, a compulsory charge can be lawfully included for lamps—articles commonly found for sale in department stores, electrical supply stores, and many other places where general merchandise is kept. Appellant claims that furnishing lamps is a necessary incident and part of the furnishing of light, and that a charge for lamps may be properly included in the charge for current used for light. This claim is inconsistent with the language used in rate 'A2.' That rate is not based on the amount of electric current consumed for light, but is based on the amount consumed for both light and power. Obviously, there is no direct relation between furnishing lamps for light and furnishing current for power. The charge for lamp service is included within the charge for current as ascertained at the meter, regardless of whether the current is used for power or light. It is apparent that rate 'A2' gives to appellant a practical monopoly of the lamp business among its consumers to the detriment of other dealers. Such monopoly is unlawful. *Hall v. Woods*, 325 Ill. 114, 156 N. E. 258. Another reason for holding rate 'A2' unlawful is that, even if a consumer should buy his lamps from a department store, he would nevertheless be compelled to pay appellant the lamp charge under rate 'A2.' This is an unreasonable provision and results in a violation of the consumer's right to purchase to his advantage and where he desires. The lamp service charge was illegally combined with the energy charge. The amount of such illegal charge must be ascertained in order to determine what is due appellee from appellant by way of reparation under section 72 of the act concerning public utilities. *Cahill's Stat.* 1931, chap. 111a, par. 91. It should be definitely ascertained and fixed in the commission's order upon the rehearing of this cause."

§ 913. **Certificates of convenience and necessity.**—Certificates of convenience and necessity are the practical means by which commissions generally regulate public utilities; and where additional service is necessary in the public interest, the certificate is issued covering it unless the existing service can be ex-

tended to provide the additional service, which is preferable, for this plan avoids duplicated investments and service by providing it through the same company. This also protects against competition, which generally results in waste and higher rates as well as less satisfactory service. Commissions are generally vested with a wide discretion in determining whether such certificates are necessary to secure satisfactory service at the most reasonable rates. Until certificates are granted, public utilities are not permitted to enter the field and render service, and competition in service may be regulated and controlled as well as the rates and service of the existing company by this plan of commission control. Certificates may be withdrawn for unsatisfactory service or any sufficient failure of the public utility to comply with the rules and regulations of the commissions.

Issuance of certificates of convenience and necessity is almost entirely for the decision of public utility commissions, because it directly affects the public service and the cost of rendering it, and the action of the commission in granting or refusing certificates and in imposing conditions for their use will be sustained if reasonable and in the interest of public convenience and necessity, which is the paramount consideration. The nature and extent of the service and the conditions under which it may be furnished, are all matters resting in the discretion of the commission. In granting a certificate, the commission may provide the conditions under which the equipment of the utility shall be located with reference to the equipment of other public utilities in order to avoid unnecessary interference with the service of either or both companies, for as the court said in the case of *Public Service Comm. v. Kansas City Power & Light Co.*, 325 Mo. 1217, 31 S. W. (2d) 67: "The public service commission, plaintiff below, brought this action in the circuit court of Cole County to enjoin the Kansas City Power & Light Company from rendering electric service to the public over a six-mile extension of said company's transmission line, which was constructed without authority from the public service commission, and for which no certificate of convenience and necessity was issued by said commission. * * * The act itself provides that it shall be liberally construed with a view to the public welfare, efficient facilities, and substantial justice between patrons and public utilities. Section 10538, Rev. St. 1919. * * * We interpret the report as holding that the power company was lawfully authorized to operate its plant in the city of St. Louis and was not required

to obtain additional certificates for extensions of its lines in the territory where it already had authority to operate. If this report should be construed as holding that a public utility which is lawfully authorized to operate in a given territory may extend its operations beyond the limits of such territory without first obtaining authority from the commission so to do, it would not be good law and should not be followed. * * * Where, as here, it is proposed that a high power electrical transmission line be constructed and operated in such close proximity to a telephone line as to injuriously affect its operation by inductive interference from the electrical line, it is for the commission in the first instance to determine whether or not the proposed electrical line is a public necessity, and, if so, whether it could, at reasonable expense, be constructed in such manner and at such distance from the telephone line as not to injuriously affect the telephone service, especially so in view of the authority given the commission by section 10481, Rev. St. Mo. 1919. * * * Appellant's next and last contention is that the question of damages to telephone service by inductive interference and the cost of its eradication is a matter of assessment of damages and injunction of which the courts and not the commission has jurisdiction. True, the commission is not a court and does not have jurisdiction to determine judicial questions, but the determination of how and where an electrical line should be built so as not to unreasonably interfere with telephone service is not a judicial question. The statute commits the determination of that question to the commission by authorizing it to supervise and regulate the construction and operation of both telephone and electrical lines and empowering it to grant permission for the construction of such lines on such conditions as it may deem reasonable and necessary. If orders made by the commission in that behalf should be unreasonable or unlawful, they would be subject to judicial review. It may be that, if an electrical utility should, without authority of law, build a high-power transmission line in close proximity to a telephone line and thus destroy telephone service, the telephone company could either sue for damages or enjoin the operation of the electrical line, but that is not the question in this case."

While the policy of refusing certificates for additional service which is not necessary for the public interest is well established, the commission, in the exercise of its discretion, has been sustained in granting certificates for natural gas service in addition to existing service for manufactured gas, because of the differ-

ence in the service and its cost. This principle was announced and discussed as follows in the case of *McFayden v. Public Utilities Consol. Corp.*, 50 Idaho 651, 299 Pac. 671, P. U. R. 1931E, 151, where the court said: "The proceeding is narrowed to a contest between a utility furnishing manufactured gas and a utility offering to furnish natural gas for the field at Pocatello and its suburb. The appellant, Public Utilities Consolidated Corporation, now occupies, and it and its predecessors for twenty years have occupied, the Pocatello field furnishing manufactured gas. * * * Appellant contends that the corporation should have been formed and application in its behalf should have been made, and claims that respondents are not the real parties seeking the certificate. The corporation is not in existence. If organized at all, it will be organized by respondents as an agency in carrying out petitioner's purposes as authorized by the commission. Their full exact purpose is shown. This objection, we think, was properly overruled. * * * Appellant assumes, and I think we may assume, that such a company, however well organized and managed, can not hope to successfully compete with a natural gas company entering the same field. As between two utilities with like ability to furnish like service under our public utility law, the company already serving a given field has a right to preference. * * * If the new service offered has no advantage over the old from the public viewpoint, other than mere competition under similar basic costs, then the convenience and necessity for it, under the public utility law, would be wanting, and the utility in the field would be entitled to protection against duplication and unwarranted competition. However, if an applicant can and does in good faith offer a better or a broader service, a different question is presented. In such case the applicant is offering the public more than sheer competition. In reality, it is offering a different service. We think a service of manufactured gas is not entitled to protection to the extent of denial of a natural gas service. The evidence justified the commission in concluding that the latter is a different service as cleaner and more serviceable in the more extensive heating uses. 'Protecting existing investments, however, from even wasteful competition must be treated as secondary to the first and most fundamental obligation of securing adequate service for the public.' Pond, *Public Utilities* (third edition), section 746. * * *

No doubt, 'the theory of the regulation of municipal public utilities by the state through such a commission (public utilities) is to avoid competition which is now generally recognized as a need-

less economic waste and an entirely insufficient method of securing the necessary regulation and control. Under this method the state through its commission takes the place of competition and furnishes the regulation which competition can not give, and at the same time avoids the expense of duplication in the investment and operation of competing municipal public utilities.' Pond, *Public Utilities* (third edition), section 901. This doctrine is approved by this court in *Idaho Power Co. v. Blomquist*, 26 Idaho 222, 141 Pac. 1083, Ann. Cas. 1916E, 282. It is thought, however, in this case we have not conditions on which that doctrine can operate. * * * We think in granting the certificate therefor the public utilities commission regularly pursued its authority in the hearing on the application of respondents, and violated no constitutional right of appellant in its order granting the application."

In granting certificates, the public convenience and necessity should be the first consideration, and the interest of public utilities already serving the territory secondary, while the desire of a new applicant for a certificate is relatively a minor matter for the consideration of the commission. The discretion of the commission in granting or denying certificates is broader, if possible, than its power in regulating rates and service, which are usually limited by statutory provisions and constitutional guaranties, while in granting certificates, no justiciable question concerning confiscation of property or the impairment of vested rights can often be involved. This principle, recognizing the wide discretion of the commission, was enunciated and discussed as follows in the case of *Kansas Gas & Electric Co. v. Public Service Comm.*, 122 Kans. 462, 251 Pac. 1097, P. U. R. 1927A, 562: "And in the particular case before us, where the commission exercises its lawful supervision over the business of plaintiffs, controls their stock and bond issues, exacts from them a prescribed quantum of service and efficiency, and practically dictates their rates and limits their profits, and where, without the express sanction of the commission and its certificate of convenience, plaintiffs would have no right to conduct their corporate affairs, it is certainly a reasonable interpretation of the act to say that plaintiffs had a right to be heard and to have their interests consulted before a certificate of convenience was granted to another corporation proposing to enter their field of activity with the avowed intention of capturing part of plaintiffs' business, and the supplying of gas to industrial plants in Wichita and Hutchinson. In years ago, when competition was the rule, 'with the race to the

swift and the devil take the hindermost,' a public service corporation established its plant, invested its capital, and investors put their savings in its stocks and bonds with their eyes open, knowing the possibility of their investments being rendered unprofitable by the intrusion of competitors in the same field. But they also had the allurements of possible large profits to stimulate their enterprise and to justify their speculative investments. Nowadays, public service companies and their stock and bondholders proceed on a different theory, which has for its basis their confidence in a fair and just administration of the Public Utilities Act. This act, while greatly restricting freedom of corporate action, is designed among other purposes to give a measure of security against ruinous competition to prudent investments of public service corporations which give the public reasonably efficient and sufficient service. * * *

"Its text fairly indicates that unnecessary duplication and ruinous competition are to be avoided, and the power of granting or withholding certificates of convenience is to be exercised with sagacious discretion, not with indifference to legitimate interests likely to be affected by the determination of the official body to whom this important power has been intrusted. *Jackman v. Public Service Commission*, 121 Kans. 141, 245 Pac. 1047, *supra*. In determining whether such certificate of convenience should be granted, the public convenience ought to be the commission's primary concern, the interest of public utility companies already serving the territory secondary, and the desires and solicitations of the applicant a relatively minor consideration. * * * The discretionary power of the commission to grant or withhold certificates of convenience to public utility companies is broader than its power to govern rates and services of such companies. In the exercise of the latter powers, the lawful scope of the commission's orders is hedged about by statutory and constitutional guaranties and inhibitions. In the granting or withholding of certificates of convenience, no justiciable question touching confiscation of property or impairment of vested rights can well arise. Time and again this court, in consonance with the prevailing attitude of courts throughout the country, has declared that it will not substitute its judgment for that of some administrative tribunal created by legislative authority for dealing with matters of nonjudicial character; and certainly the question whether a competing gas company should be licensed to serve industrial plants in and around Wichita and Hutchinson is peculiarly a question for an official board to determine and one with which a judicial tribunal should be slow to meddle."

In issuing certificates, the commission may require the payment of a reasonable fee as a condition precedent and may impose such other conditions to its exercise as are reasonable and necessary, as is indicated in the case of *Georgia Highway Express v. Harrison*, 172 Ga. 431, 157 S. E. 464: "The fee of thirty-five dollars to be paid to the comptroller general for the issue of a 'certificate of (public) convenience and necessity,' as required by section 16, and the fee of twenty-five dollars to be paid to the comptroller general for registering each vehicle, and issuing a license therefor, as required by section 17, constitute conditions precedent which must be complied with before the operators of buses can engage in the business of transporting passengers or property, or both, for hire over the public highways of this state, and do not constitute an occupation tax upon this business. *Inter-City Coach Line Inc. v. Harrison*, 172 Ga. 390, 157 S. E. 673. The language, 'and this shall be the only license or operating tax imposed upon any motor carrier by this state,' contained in section 19 of the Motor-Carrier Act, refers to the license or operating tax imposed by sections 16 and 17 of the act, and is not an occupation tax upon this business. This part of the Motor-Carrier Act of 1929 is not repugnant to the provision of the amendment to the General Tax Act referred to in the first division hereof. That portion of paragraph 114 added to the General Tax Act of 1927 by the amendatory act of August 29, 1929, imposing the occupation tax therein provided, is not null and void for the reason that the language in said paragraph, 'loaded capacity,' has no meaning, and is too indefinite and unintelligible for the computation of this tax, nor for the reason that the language, 'coming within the terms of this act,' is without meaning for the reason that nowhere in the act is there anything which defines that expression. * * * The tax imposed by said paragraph is not void for the reason that it is prohibitive and confiscatory, and deprives petitioners of their right to carry on a lawful business."

The commission may revoke certificates issued by it for violations of reasonable rules and regulations imposed as a condition of their exercise, and the commission is generally invested with the power of deciding questions of violation and may not be required to await the decision of the courts on collateral matters, as was indicated in the case of *State v. State Road Comm.*, 100 W. Va. 531, 131 S. E. 7, where the court said: "The evidence taken at the hearing before the commission shows that the petitioner operated two taxicabs. He drove one taxi in person and employed Leslie Gee to operate the other. About August, 1925,

passengers were received on each of petitioner's taxis at places within one hundred feet of a regularly designated stop of the Logan Bus Company. The latter had a permit to operate vehicles over a fixed route from Logan to Omar, and had established regular stops on this route. At the time of the occurrence complained of, petitioner announced, 'Here is a car going to Omar.' No evidence was offered before the commission in palliation of this act. The provision of section 82, class H. etc., violated is: 'Provided, however, that vehicles operating under class H-3 may receive passengers along routes for which a certificate of convenience has been granted, but not at or within two hundred feet of any building owned or maintained as a designated stop.'

* * * There are two questions to be answered in this case: (1) Can the commission revoke a certificate of convenience because of a violation of the statute until there has been a conviction therefor in a court authorized to try misdemeanors? (2) Is the revocation of the chauffeur's license because of such violation arbitrary or illegal? 1. An analysis of the statute shows that for its violation a twofold punishment is provided. One part of this punishment is in personam, by a fine imposed in a regular criminal proceeding, where the offense must be established beyond all reasonable doubt. The other part of the punishment is in rem, by revocation of a permit, upon a hearing before the commission, where it is requisite that the offense be established by only a preponderance of the evidence. There is nothing novel about legislation providing a fine (or fine and imprisonment) and also a forfeiture or penalty. But our statute is unique in that the hearing, in re the revocation of a permit, is had before a commission instead of before a court. Yet there can be no doubt as to the intention of the legislature in this respect. * * * Those who oppose * * * say * * * that the legislature intended for the commission to await the conviction of an offender in a criminal court, no matter how long the delay, and then to try the convicted one a little bit, in fact just enough for the commission to determine whether the violation be of such character as to warrant revocation of the offender's permit. This view overlooks the fact that the character of the offense could be ascertained by the commission from the criminal proceeding and a hearing for that purpose alone would therefore be bootless. It also ignores the congestion and dangers of our highways and the necessity, patent to the legislature, of providing a summary treatment of those who hinder or endanger travel thereon. The personal punishment of the offender can await the slow course of criminal

procedure, but the welfare and safety of the public demand that the right to use our highways be speedily taken from those who abuse this privilege. There are no words in the statute limiting or modifying the word 'hearing.' Why seek in conjecture to supply words of limitation, the effect of which would be to hamper the efficiency of the commission, to inconvenience and possibly endanger the public, and to delay justice? The commission is composed of men carefully selected for their judgment and integrity. Its members are sworn to the faithful performance of their duties. Are they not as well qualified as the average jury to weigh the evidence of an alleged violation of the road law? If their discretion is sufficient to pass on the gravity of the offense, as suggested, then it is also sufficient to ascertain whether a violation has in fact occurred. * * * If our legislature had intended to make the revocation dependent on the personal penalty, the statute would have read like this: 'Shall be guilty of a misdemeanor, and upon conviction thereof shall be punished with a fine of not less than five dollars nor more than two hundred dollars, and after such conviction such certificate of convenience may be suspended or revoked,' etc. * * * We therefore follow the current construction of the words 'in addition thereto' and hold that, as used in our statute, they are equivalent to 'also,' 'likewise,' 'besides,' etc. * * * To properly serve and protect the public it has been found necessary to pass certain laws regulating the use of the highways by chauffeurs. In order to secure obedience to those laws, the commission may have found it necessary to discipline the offenders. If so, its action was purposed to benefit the public, and can not be held as arbitrary. Mandamus may not be invoked to control a power of the commission expressly made discretionary by the statute."

Where the statute does not authorize municipalities to grant franchises to public utilities, such utilities do not secure indeterminate permits by simply occupying highways under statutory authority and extending their service within the municipality, for as the court said in the case of *South Shore Utility Co. v. Railroad Commission* (Wis.), 240 N. W. 784, P. U. R. 1932B, 465: "No statute of this state confers express authority upon towns to grant franchises to public utilities. * * * While the legislature has given no authority to towns to grant franchises, it has in section 196.55, 1927 Stats., recognized that a public utility might exist claiming authority to operate by virtue of a franchise granted by a 'town' or 'other governing body' of a town. It seems very clear to us that the intent and purpose of section

196.55, as originally enacted, was for the purpose of bringing within the law every public utility operating in this state at that time, regardless of the source of its authority to operate, and regardless of whether such authority or franchise was originally given to it by a town. A careful review of all the statutes bearing upon this question reveals that the legislature has never seen fit to authorize towns to grant franchises to public utilities, nor to provide in what manner a public utility may secure, if at all, an indeterminate permit in a town. * * * To hold that the legislature intended that a public utility which first rendered service in a town should thereby secure an indeterminate permit, or a right in the nature of an indeterminate permit, in the whole town would be to supply, by judicial construction, something that the legislature has failed to declare. * * * We conclude that, under the existing law, a public utility does not obtain an indeterminate permit in a town by simply occupying the highways pursuant to the permit authorized by section 86.16, Stats., or by virtue of organization under section 180.17, Stats., or by merely extending its service to persons and places within a town."

Under proper statutory authority, the corporation commission is authorized to issue certificates of convenience and necessity for the operation of cotton gins, which are declared by the statute to be public utilities. In sustaining the power of the commission to require such a certificate before operating cotton gins as a means of regulating the marketing of cotton and encouraging cooperative concerns engaged in this business, the court in the case of *Corporation Commission v. Lowe*, 281 U. S. 431, 74 L. ed. 945, 50 Sup. Ct. 399, said in part: "This suit was brought by the appellee, William Lowe, to restrain the corporation commission of Oklahoma from issuing a license to the Farmers Union Co-operative Gin Company to construct and operate a cotton gin at Packingtown, Oklahoma. The appellee operates a cotton gin at Capitol Hill, Oklahoma City, under a license issued by the corporation commission, and the ground of the suit was that the issuing of a license to the Farmers Union Co-operative Gin Company, in view of the privileges with which that company would be able to operate under the applicable statute of Oklahoma, would constitute an injurious invasion of the appellee's business and an unreasonable discrimination against him, thus depriving him of his property without due process of law and denying him the equal protection of the laws in violation of the Fourteenth Amendment of the federal Constitution. * * *

The bill of complaint alleged that cotton gins are public utilities

under the law of Oklahoma and that the corporation commission is vested with authority to regulate them and to fix the rates, charges, and rules to be observed in their operation. There is no controversy upon these points. The dispute grows out of the privileges accorded by statute to the appellant company as a corporation formed to conduct business upon a cooperative plan. * * * In the present instance, the authority given to the appellant company by the statute with respect to the distribution of net earnings may be regarded as a declaration that such a distribution of net earnings among patrons of cotton gins is not contrary to, but in accord with, the policy of the state, and, until the contrary appears, the assumption must be that in giving effect to its policy, the state will not permit an injurious and unreasonable discrimination. If, hereafter, in the regulation of his business, the appellee is subject to such a discrimination in violation of his constitutional rights, he will have his appropriate remedy."

On the theory that title insurance business is public and affected by a public use, the federal court sustained the statutory enactment of Texas, authorizing its board of insurance commissioners reasonably to regulate such business, including its rates and forms of policies written within the state, in the case of *New York Title & Mortgage Co. v. Tarver*, 51 Fed. (2d) 584, where the court said: "From the evidence and record in the case at bar it is found, and held, that title insurance, and uniform rules and regulations as to forms of policies and premiums therefor, is a business of public interest, affected by a public use. * * * The court further finds that the form of policy, uniform form of policy, premium rates, schedules of rates and fees, rules and regulations, so adopted, prescribed, and promulgated by the board of insurance commissioners of Texas, under and by virtue of provisions contained in section 3 of said Title Insurance Act aforesaid, in complainant's bill alleged, are not shown to be arbitrary or unreasonable, but on the other hand to be reasonable, and non-confiscatory as to the company. * * * A state government, under powers inherent in every sovereignty, may enact laws to regulate a business, otherwise private in nature, that has become affected with a public interest; under its police power, so long as such regulation is not arbitrary and unreasonable. * * * Whether rate regulation is necessary in regard to a particular business affected by a public use, such as insurance, is a matter for legislative determination. The court can only determine whether the legislature has the power to enact it. *German Alli-*

ance Ins. Co. v. Lewis, Sup't of Ins. of Kansas, 233 U. S. 389, 34 Sup. Ct. 612, 58 L. ed. 1011, L. R. A. 1915C, 1189. That by reason of the fact that title insurance is here found and held, by the court, to be a business of public interest affected by a public use, the legislature of the state of Texas had power to enact said Title Insurance Act of February 27, 1929, and, as in section 3 thereof (Vernon's Ann. Civ. St., art. 1302a, section 3) provided, vest the board of insurance commissioners with legal authority and power to adopt and prescribe uniform rules and regulations as to forms of policies of such insurance and rate of premiums therefor, and further provide, as in said section of said act set forth, that 'under no circumstances may any company use any form until after the same shall have been approved by the board.' It is further held by the court that the form of policies so prescribed and rates of premiums so fixed and prescribed by the board of insurance commissioners of the state of Texas, here in question, as shown by the record herein, are not shown to be arbitrary or unreasonable. * * * That said Title Insurance Act is held to only relate to and affect form of policies and premium rates of such insurance, etc., within the state of Texas, the doing of business within the state of Texas; not to be extra-territorial in its effect, and same can not affect the form of policies in use by complainants in other states than the state of Texas or rates of premium charged on policies written outside the state of Texas not to be performed within this state. The state of Texas has the power to say what kind of title insurance business shall be performed in the state of Texas. *Bothwell et al. v. Buckbee, Mears Co.*, 275 U. S. 274, 48 Sup. Ct. 124, 72 L. ed. 277."

A state may require a foreign corporation to secure a charter from it before granting such corporation a permit to transact business within the state, although the business may be interstate in its nature, because this does not impose a burden on interstate commerce, as was indicated in the case of *Railway Express Agency, Inc. v. Commonwealth of Virginia*, 282 U. S. 440, 75 L. ed. 450, 51 Sup. Ct. 201, P. U. R. 1931B, 228, where the court said: "The appellant's right to do interstate business is not questioned, but it was held by the supreme court of appeals that being a foreign corporation created since the constitution of the state went into effect in 1902, it was prohibited by that instrument from doing intrastate express business by the plain words of section one hundred and sixty-three. * * * Virginia is not attempting to go beyond its power by indirection or to take anything from anybody. It simply is refusing to grant

a foreign corporation a permit to transact local business without taking out a charter from the jurisdiction within which that business must be done. There is no substantial evidence that the refusal would impose a burden on interstate commerce and it is presumed to be constitutional. *O'Gorman & Young v. Hartford Fire Ins. Co.* (1931), — U. S. —, 75 L. ed. —, 51 Sup. Ct. 130."

Until the railroad commission finds as a matter of fact that public convenience and necessity require the installation of additional service, it may not grant such certificates, under statutory authority in most of the states, unless the facts indicate that the service is necessary for the public convenience. This principle was discussed at length in the case of *Texas Motor Coaches, Inc. v. Railroad Commission* (Tex. Civ. App.), 41 S. W. (2d) 1074, P. U. R. 1932B, 295, where the court said: "The whole tenor of the Motor Transportation Act (Vernon's Ann. Civ. St., art. 911a, sections 1-13, 15-19, and Vernon's Ann. P. C., art. 1690a) indicates that the welfare of the public is the matter of first consideration, and that permits to individuals or corporations to use the public highway for profit are not to be granted in any event if existing transportation facilities thereon are adequate; nor until and unless the railroad commission has ascertained that there is a need of, and a demand for, such additional facilities. * * * While the commission is given considerable latitude in the manner in which it may proceed to ascertain the facts prescribed in the statute as prerequisite to the granting of such permit, the duties of the commission prescribed in the act are, we think, mandatory, and the commission is without authority to issue such permit until it has ascertained the facts prescribed by the statute as essential. It can not act arbitrarily in such matters and issue such permit without ascertaining such facts. * * * We think the Motor Transportation Act itself recognizes appellant as such a party at interest, in requiring that an application for a permit contain, among other things, a map or plat showing not only the route proposed, but on which 'shall be delineated the line or lines of any existing transportation company or companies over the highway serving such territory, with the names and addresses of the owner or owners thereof' * * *. Under the allegations made, appellant's business as a common carrier, whether its permit be deemed a franchise or merely a license, would obviously be injured by the South Texas Motor Coaches, Inc., operation, and entitled to restrain such operation. * * * Whereas, in the case of the state

highways no such right exists in any motor bus operator, his right to conduct his business thereon at all is purely permissive. Such right must first be granted by the commission after ascertaining the facts prescribed by the statute, before the commission's powers and duties in regulating the operation of that business are called into use. The matter of granting a permit, therefore, or the right to do business on the highways, is determined wholly by the needs and convenience of the public, the character of the highway, the ability of the applicant to render the service, etc.; in brief, by the conditions set out in the statute. It is not, therefore, strictly analogous to an order regulating operation after a permit to do business has been granted. Regardless of such analogy, however, if in fact the commission, without complying with the requirements of the law, granted such permit, thus affording illegal competition to appellant injurious to its business, such order was we think as a matter of law unjust and unreasonable to it, whether appellant attacked it on that specific ground or by the use of the express language of the statute or not."

§ 914. Federal jurisdiction and radios.—As the Federal Radio Act defines the duties of radio stations operating under it and provides that a violation of an order, issued by the commission in accordance with the act, is sufficient cause for a revocation of the license, an order of the commission revoking a license for this reason will be sustained, especially where the evidence fails to show that the station served the public interest, convenience, or necessity, for as the court said in the case of *Riker v. Federal Radio Comm.*, 55 Fed. (2d) 535: "It is provided by the commission's General Order No. 7, promulgated on April 28, 1927, that a maximum of one-half kilocycle is fixed as the extreme deviation from the authorized frequency of any station operating under license issued under the terms of the Radio Act of 1927, and that maintenance of the assigned frequency within the prescribed limits is the duty of each radio broadcasting station, and that a violation of this order will be deemed by the commission cause for revocation of a license under section 14 of the Radio Act of 1927 (47 USCA, section 94). Section 14, just mentioned, defines the causes for which broadcasting licenses may be revoked by the commission; among these causes are 'failure to operate substantially as set forth in the license,' and 'failure to observe any of the restrictions and conditions of this act, or of any regulation of the licensing authority authorized by this act.' Moreover, the record fails to disclose the actual condition and

circumstances upon which appellant relies as proof that his station serves the public interest, convenience, or necessity. Nor does the character of the programs broadcast by the station tend to sustain such a claim. * * * In our opinion, the findings of fact made by the commission are supported by substantial evidence, and the commission's conclusions are not arbitrary or capricious."

An order of the federal radio commission refusing to issue a renewal permit for the operation of a radio station, which was hopelessly insolvent and which had leased and installed new apparatus without the approval of the commission, will be sustained by the court, although the refusal was made without hearing oral argument, for as the court said in the case of *Sproul v. Federal Radio Comm.*, 54 Fed. (2d) 444, P. U. R. 1932B, 282: "It appears from his testimony that since 1929 appellant has been hopelessly insolvent, with no credit standing, and has been harassed by his creditors, some of them with judgments against him; that his insolvency resulted in the loss of the transmitter used by him in the operation of his station in April, 1930; that notwithstanding the provisions of section 21 of the Radio Act (47 USCA, section 101), requiring a permit from the commission as a condition precedent to the construction of apparatus for the transmission of radio broadcasting, he proceeded to lease and install new apparatus without the approval of the commission; that in September, 1930, the operation of this transmitter was finally discontinued at the instance of a radio inspector of the department of commerce, and that it was afterwards repossessed by the lessor for noncompliance with the lease agreement; that at the date of the hearing appellant was still hopelessly insolvent, having judgments outstanding against him in the sum of about \$50,000, with assets of only \$500, possessing no broadcasting equipment, and with no ability to assure the commission that another transmitter, if constructed by him, would not in turn be seized by his creditors with resulting discontinuance of the service to the public. These facts are entitled to the same consideration, appearing as they do from appellant's own testimony, as if they had been incorporated in appellant's application for a renewal license. If they had been made part of the application, the commission would have been justified in refusing it thereupon, for they conclusively show that appellant was not then prepared, in case of a renewal, to serve the public interest, convenience, or necessity, by broadcasting. See *Technical Radio Laboratory v. Federal Radio Commission*, 59 App. D. C. 125, 36

Fed. (2d) 111, 66 A. L. R. 1355. It was not an abuse of discretion in this case for the commission, acting under its General Order No. 93, to consider and pass upon the application without hearing oral argument thereon."

In the absence of conclusive evidence that public interest, convenience, or necessity requires the reduction in power of certain radio stations for the benefit of another or the public welfare generally, which the applicant must produce, the radio commission is justified in refusing the application, as is indicated in the case of *Strawbridge & Clothier (Station WFI) v. Federal Radio Comm.*, 57 Fed. (2d) 434, where the court said: "This provision obviously places upon an applicant the burden of proving that it would be for the public interest, convenience, or necessity to reduce the power of one station for the benefit of another. Many elements must be considered in the determination of that question. In the present case the commission has found that Philadelphia is now receiving good broadcasting service and that the granting of appellant's application would not materially better that service, but would materially affect the service of other stations. Appellant has entirely failed to prove that the reduction in power of the stations at Miami, Fla., Chicago, Ill., and Knoxville, Tenn., operating on the same frequency, would be to the public interest, convenience, or necessity."

Where radio stations are both giving useful and satisfactory public service, the radio commission is justified in denying an application to take time from one station and allot it to another, where the effect of doing so would be to eliminate the former station, for as the court said in the case of *Woodmen of the World Life Ins. Assn. v. Federal Radio Comm.*, 57 Fed. (2d) 420: "However, the commission, upon consideration of the testimony, decided that the granting of the application would not serve public interest, convenience, or necessity, and denied the same. * * * Upon a review of the record we do not find that the commission's decision is unsupported by substantial evidence, or is arbitrary or capricious. If the time now allotted to WCAJ is taken from that station and granted to WOW, the former station will be eliminated, unless concurrently some other time is allotted to it. The present case makes no provision for that contingency, and the commission states in its decision that the granting of appellant's application 'would require the forfeiture of the entire assignment now used by respondent.' This is doubtless based upon the fact that the state of Nebraska is already overquota on regional and local channels, and, if appellant's ap-

plication be granted, the commission would be compelled either to make another assignment to WCAJ in Nebraska or delete the station. * * * The respective stations have performed useful public service, and doubtless can continue to do so, under the present allocation."

Federal regulation of radio service is properly exercised by the Federal radio commission, and before the courts will interfere in granting certificates for service or making other regulations, reasonably necessary to regulate the service, the party must exhaust its remedy under the statute and show that the action of the commission, when invoked, was arbitrary or unreasonable, for as the court said in the case of *White v. Federal Radio Comm.*, 29 Fed. (2d) 113: "This power of the court should be exercised only in clear cases, and where intervention is necessary to protect rights effectually against injuries otherwise irremediable. The regulation of radio communication is a valid exercise of the power of congress under the commerce clause. The Act of February 23, 1927, is not invalid, in whole or in part, by reason of the indefiniteness of the standard prescribed by congress for the guidance of the commission in issuing licenses. The Act of February 23, 1927, is not invalid, in whole or in part, by reason of the requirement that an applicant for a license shall sign a waiver of any claim to the use of any particular frequency or wave length or of the ether, as against the regulatory power of the United States, because of the previous use of the same, whether by license or otherwise. The construction of plaintiff's plant and its operation under the licenses obtained prior to the Act of February 23, 1927, did not create property rights which may be asserted against the regulatory power of the United States, if that power is properly exercised. The commission, in making orders relative to licenses, is subject to the following rule: Administrative orders, quasi-judicial in character, are void, if a hearing was denied, if that granted was inadequate or manifestly unfair, if the finding is contrary to the indisputable character of the evidence, or if the facts found do not as a matter of law support the order made. The commission may not capriciously make findings by administrative fiat. Such authority, however beneficially exercised in one case, could be injuriously exercised in another, is inconsistent with rational justice, and comes within the constitution's condemnation of all arbitrary exercise of power. Upon the record presented, I am not prepared to hold that the order of the commission is contrary to the indisputable character of the evidence, and, therefore, arbitrary and void. The stat-

ute provides a method of review, where it is claimed that the commission has improperly exercised its power under the statute in refusing licenses. It is not to be believed that the commission would claim, if an appeal were taken, that what it has done in substance is to refuse what the plaintiff sought, although it did give its permission to do something else. I am of the opinion that the plaintiffs have not exhausted their remedy under the statute."

Under its power to regulate interstate commerce, which the court holds radio communications to be, and by virtue of the authority conferred by congress in the statute creating the federal radio commission, the federal courts will entertain an appeal from the decision of this commission and sustain its action in denying a certificate for the continuation of a service which is neither adequate nor convenient to the public interest, for as the court said in the case of *Technical Radio Laboratory v. Federal Radio Comm.*, 36 Fed. (2d) 111: "It is argued that, since the period for which the license might have been issued has expired, this appeal has become moot, and should be dismissed. We do not agree with this contention. Such an interpretation of the act would practically nullify the right of appeal granted by congress in such cases, for it is rarely possible for a station to secure a decision upon such an appeal within three months after the right of appeal accrues. This fact was of course well known to congress when the statute was enacted. Moreover the relief sought by an applicant for renewal is not limited to the issue of a license for three months only, but includes a continuing right to apply thereafter at proper times for successive renewals thereof. The statutory appeal accordingly contemplates the restoration to the appellant, if his claim be sustained, of the continuing right to make such application to the commission as he would have enjoyed had his application first been allowed. We feel justified therefore in entertaining the appeal. * * * The commission ruled that such statements, whether written or oral, would not be accepted as evidence of the facts stated therein. We find no error in this ruling. On the other hand, we think that the commission has the authority, under reasonable regulations, to depart from the strict jury trial rules of evidence which are applicable to court proceedings. * * * Congress has power to regulate interstate commerce, and radio communication in general falls within this classification. *White v. Federal Radio Commission* (D. C.), 29 Fed. (2d) 113; *United States v. American*

Bond & Mtg. Co. (D. C.), 31 Fed. (2d) 448; Davis, Law of Radio Communication, p. 29. It may be questioned whether radio broadcasting can in any case be so restricted in practice as to be wholly intrastate in character. It is clear, however, that the broadcasting service of WTRL can not be exclusively intrastate, for its location is such that its electric waves may cross state lines, and may also interfere with the reception of radio communications from other states. The present application filed by the station for a federal broadcasting license is an implied admission of this fact. In the Radio Act of 1927 (section 11) congress invested the federal radio commission with authority to examine applications for station licenses, or for the renewal or modification of such licenses, and to grant or refuse the same as the public interest, convenience, or necessity may require. A hearing upon notice and an appeal to this court are allowed in case of a refusal. The validity of such a refusal may also finally be tried upon proper issues in other forums. The appellant therefore is not denied due process of law. Moreover, under the Radio Act of 1927, the only property right which was acquired by appellant in the use of the ether as a medium of communication was such as was granted to it by the terms of its license, and was subject to the conditions contained therein relative to power, frequency, the time for which the license was granted, and also the provisions governing the renewal thereof. It may be added that the authority of congress to regulate radio communication as a species of interstate commerce necessarily implied the right of reasonable regulation to control in the public interest the number, location, and activities of the broadcasting stations of the country as an integral system, and such control must necessarily at times involve the right of reasonable restriction and pro tanto prohibition. Davis, Law of Radio Communication, 71. * * *

It appears that Midland Park is located in Bergen County, N. J., at a distance less than fifty miles from the various broadcasting stations at or near the city of New York. It also appears that station WTRL is limited by the terms of its license to a power of fifteen watts and a wave length of 206 meters. It is manifest from the record that due to the station's power and inadequate wave length, and the lack of care and attention given to it, the station has been of no actual benefit to its owners or to the community of Bergen County. This fact is substantially conceded in the testimony introduced by appellants. * * *

The material equipment of the station at present is meager. The parlor of

the manager's home is used as a 'studio'; the broadcasting apparatus is located in an adjacent shed used formerly as a barn; the antenna is a wire fastened to a pole nailed upon the shed. The station has rarely been on the air, and its programs have been almost entirely limited to phonograph reproductions. So irregular have been these efforts that the radio supervisor of the department of commerce, who had supervision over this district, and one of whose duties it was to make a check of broadcasting stations in his district in order to determine whether or not they were operating within the limit set by the commission, was unable to discover this station on the air during the full year preceding the hearing. * * * The real substantial object sought by appellant in this controversy is not to secure a renewal of the present license but a modification of its terms, whereby the station will be allowed greater power and a better wave length, with a right of removal to some other location. That question, however, is not now before this court, and can not be decided upon the present record. In the case actually before us we must hold that the commission was justified in its decision that a renewal of the present station's license would not serve the public interest, convenience, or necessity, and its decision to that effect is affirmed with costs, including the cost of printing."

Where the decision of the federal radio commission is reasonable and the evidence sufficient to justify its refusal to grant additional certificates for service in a certain territory, the court will sustain it, because this is a matter peculiarly within the power of the commission to determine, as is indicated in the case of *Havens v. Federal Radio Comm.*, 59 App. D. C. 393, 45 Fed. (2d) 295, where it was said: "(1) That broadcasting station WGHP at Detroit, Mich., was operating under license upon a frequency of 1,240 kilocycles with a power output of 1,000 watts, and, if appellant's station should be given the same frequency with 500 watts power, a serious heterodyne interference would result from the simultaneous operation of the two stations, the distance between them being about 460 miles; and (2) that the state of Virginia, being in the second zone, already enjoyed more than a fair and equitable proportion of the facilities available to that zone upon the basis of population, and the city of Richmond already enjoyed a full share of the radio facilities of the state. These findings, if justified by the record, are sufficient to sustain the refusal of appellant's application. * * * The commis-

sion held that there were other localities in Virginia in need of broadcasting facilities, and now applying therefor, and that, if new construction is to be permitted in the state, it is in the public interest, convenience, and necessity that it should go to some place where there are as yet no stations, and not to a city which 'already enjoys a fair share of the broadcasting facilities to which its state is entitled.' It has not seemed necessary for us to review in detail the various assignments of error urged by appellant, for in our opinion the decision of the commission is not contrary to the evidence in the record."

A sale by one public utility to another of its service for distribution by the latter company to its customers, where the service is transmitted from one state to another is interstate commerce, and for this reason is not subject to state regulation, as is indicated in the case of *Public Utilities Comm. v. Attleboro Steam & Electric Co.*, 273 U. S. 83, 71 L. ed. 549, 47 Sup. Ct. 294, P. U. R. 1927B, 348, where the court spoke as follows: "The Narragansett Electric Lighting Company is a Rhode Island corporation engaged in manufacturing electric current at its generating plant in the city of Providence and selling such current generally for light, heat and power. The Attleboro Steam & Electric Company is a Massachusetts corporation engaged in supplying electric current for public and private use in the city of Attleboro and its vicinity in that state. In 1917 these companies entered into a contract by which the Narragansett Company agreed to sell, and the Attleboro Company to buy, for a period of twenty years, all the electricity required by the Attleboro Company for its own use and for sale in the city of Attleboro and the adjacent territory, at a specified basic rate; the current to be delivered by the Narragansett Company at the state line between Rhode Island and Massachusetts and carried over connecting transmission lines to the station of the Attleboro Company in Massachusetts, where it was to be metered. The Narragansett Company filed with the public utilities commission of Rhode Island a schedule setting out the rate and general terms of the contract and was authorized by the commission to grant the Attleboro Company the special rate therein shown; and the two companies then entered upon the performance of the contract. * * * It is conceded, rightly, that the sale of electric current by the Narragansett Company to the Attleboro Company is a transaction in interstate commerce, notwithstanding the fact that the current is delivered at the state line. The transmission of electric current from one

state to another, like that of gas, is interstate commerce. * * * Plainly, however, the paramount interest in the interstate business carried on between the two companies is not local to either state, but is essentially national in character. The rate is therefore not subject to regulation by either of the two states in the guise of protection to their respective local interests; but, if such regulation is required it can only be attained by the exercise of the power vested in congress."

Nonresident corporations are not subject to regulation by the state and the federal court will grant relief where they are being deprived of their rights or property in violation of the federal Constitution, as was indicated in the case of New Hampshire Gas & Electric Co. v. Morse, 42 Fed. (2d) 490, P. U. R. 1930D, 427, where the court spoke as follows: "In their written argument filed in behalf of the commission, counsel have not argued the question of jurisdiction, but say they have no intention of waiving the point previously made in oral argument that, inasmuch as the New Hampshire Supreme Court has full power to review the action of the commission, this court is without jurisdiction until the Supreme Court of the state has decided adversely the plaintiffs' contentions. We can not indorse the position taken by counsel for the commission. * * * The jurisdiction of the federal court to entertain this bill is, as to the two nonresident corporations, too clear to require the further citation of authorities. * * * If the commission in its interpretation of them is attempting to attribute to them unconstitutional powers affecting the liberty or property rights of citizens beyond its boundaries, a court of equity has power to act. * * * The fact that service by letter is directed to the home offices of the corporation outside the state of New Hampshire is an implied admission that they have no officers or agents within the state upon whom service could be made. * * * The affidavits presented on behalf of the plaintiffs, Associated Gas & Electric Company and the New England Gas & Electric Association deny that either is engaged in any business in the state of New Hampshire. It is admitted that the New England Gas & Electric Association owns all of the stock of the New Hampshire Gas & Electric Company and a substantial portion of the stock of the Derry Electric Company. * * * It does not necessarily follow as a matter of law that, because the New England Gas & Electric Association owns all or nearly all of the stock of the two New Hampshire corporations, those corporations are eliminated as operating com-

panies. * * * If the commission wrongfully assumed jurisdiction either because of an unconstitutional state statute, or because it interprets a constitutional statute as authorizing unconstitutional acts and adjudged the corporations, their officers, and agents in contempt and subject to the penalties imposed by the New Hampshire statutes, the plaintiffs will be deprived of their property and rights in violation of the Fourteenth Amendment of the federal Constitution. A preliminary injunction will hold the matter in abeyance until the important question of jurisdiction can be properly determined after a full hearing and consideration of the facts."

CHAPTER 33

APPEALS FROM COMMISSIONS

| Section | Section |
|--|--|
| 915. Effectiveness of commission control and right of appeal. | 933. Federal courts on commission control. |
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§ 915. Effectiveness of commission control and right of appeal.—The effectiveness of the control of municipal public utilities by state commissions is determined by the thoroughness of their findings, the justice of their rulings and the extent to which the proceedings and orders of the commissions are sustained by the courts or made final and conclusive by statutory

enactments. While the strength of the commissions' findings and the validity of the orders issued thereon depend upon the scope and accuracy of their investigations and the integrity of their rulings, the force and effect of commission control depend ultimately upon the authority conferred on the commissions by the legislatures in the first instance and the extent to which action by commissions is made conclusive of the controversy. The right of review or appeal to the courts from the proceedings of commissions limits and defines the sphere of their efficiency and determines the extent to which the courts may supplant, modify, or set aside the action of commissions; thereby making their findings and orders conditional and qualified, and not absolute and final.

That the effectiveness of commission control depends largely on the attitude of the courts in hearing appeals from the commission's findings and orders, and that the justification of the court's refusing to entertain an appeal before a full hearing and determination of the matter by the commission were well expressed in *Williams v. Southern Bell Tel. & T. Co.*, 164 Tenn. 313, 47 S. W. (2d) 758: "It was therein ruled by this court, following universal authority, that the power to fix rates to be charged by public service companies is a legislative power and not a judicial power, and that the effect of the act creating the railroad and public utilities commission (Pub. Acts 1919, c. 49) is 'to confer upon the commission exclusive jurisdiction, in the first instance, to establish reasonable rates and charges.' * * * In the case now before us, the record wholly fails to indicate that the commission acted arbitrarily or in excess of a reasonable discretion in requiring the petitioner to file evidence of reason or necessity for a postponement of the hearing on the complaint. The order previously entered set the matter for full hearing on the date fixed, and did not limit the hearing to the preliminary motions. * * * It appears therefore that petitioner has merely gone through the form of invoking action by the commission on the complaint filed, and that there has been no hearing or action taken on proof offered to sustain the complaint. The ruling in *McCollum v. Southern Bell Telephone & Telegraph Co.*, 163 Tenn. 277, 43 S. W. (2d) 390, *supra*, is meaningless and empty, if the jurisdiction of the commission can be avoided by the simple expedient of failing to adduce evidence to sustain the complaint and refusing to comply with the commission's reasonable requirement for a showing of a right to a continuance or postponement of the hearing, and then seeking a hearing *de novo* in

the circuit court by certiorari. Such procedure is, we think, to trifle with the commission and with the courts, and we hold that the complaint was abandoned when the complainants failed to offer evidence to sustain it and refused to seek a postponement in the required form. * * * The circuit court was without jurisdiction of the subject-matter, for the reasons stated in *McCollum v. Southern Bell, &c. Company*, *supra*, and the petition was properly dismissed whether on the plea filed or on the court's own motion and initiative. A court can not acquire jurisdiction of the subject-matter of an action by consent of the parties, whether express or implied, from a failure to make objection in proper form."

§ 916. *Petitions for rehearing.*—After an investigation of the facts on due notice, usually of not less than ten days, and a public hearing, and the proceedings of the commission have been concluded and disposed of with an order or finding, an interested party may generally apply to the commission for a rehearing because of additional evidence, changed conditions, or errors and omissions in its original proceedings. The time within which a petition for rehearing may be filed is limited by statute in Ohio to thirty days,¹ and in Pennsylvania to fifteen days;² while in Illinois only one rehearing may be granted, which, however, does not prevent any party after two years from again applying to the commission upon a new and different state of facts,³ and in Washington any public service corporation, affected or aggrieved by any order of the commission, may, after two years, file a petition for rehearing, and in cases where the order has not been reviewed by the court but complied with by the company, the petition may be filed within six months.⁴ An application for rehearing, which must specifically set forth the reasons therefor and be filed within a month, if not before the order takes effect, is frequently made a condition precedent to judicial review as in New Hampshire,⁵ Missouri,⁶ Ohio,⁷ and California.⁸

As a general rule, a petition for rehearing before the commission must precede the taking of an appeal, for as the court said in the case of *Consumers Co. v. Public Utilities Comm.*, 40 Idaho 772, 236 Pac. 732: "A party is required to ask for a rehearing

¹ Throckmorton's Ohio Gen. Code 1930, § 543.

² Pennsylvania Stat. 1920, § 18175.

³ Smith-Hurd Illinois Rev. Stat. 1931, ch. 111½, § 71.

⁴ Remington's Washington Comp. Stat. 1922, § 10431.

⁵ New Hampshire Public Laws 1926, ch. 239, § 1.

⁶ Missouri Rev. Stat. 1929, § 5233.

⁷ Throckmorton's Ohio Gen. Code 1930, § 543.

⁸ Deering's Cal. Gen. Laws 1931, Act 6386, § 66.

before taking an appeal, and may ask for a rehearing of the cause in its entirety or of only one or more of the matters determined in the original order. * * * On the rehearing allowed by the commission, among other things, appellant offered certain evidence with respect to going concern value, but the commission rejected such evidence. * * * The commission construed together the application and petition for a revaluation and gave them the same effect as an application for a rehearing. It granted and held a hearing and (in order No. 960) declined to make the requested allowance for going concern value. Within thirty days after the filing of order No. 960 the appeal was perfected. The application and petition for revaluation had the effect of a petition for rehearing; they were so considered by the commission; they merely brought to the attention of the commission the fact that it had, in its second order (No. 881), failed to place a going concern value on appellant's property, and asked that such a value be given the property. They were incorrectly labeled, but they constituted, to all intents, an application for rehearing. * * * A rehearing of the second order having been granted, a hearing held, and an appeal having been perfected within thirty days after the rendition of the decision on the last rehearing, the motion to dismiss the appeal is denied."

§ 917. **Action of commission on petition for rehearing.**—The commission may exercise its own discretion in granting a rehearing or dismissing the petition, and on a rehearing may, in its discretion, sustain, modify, or revoke its original action. The time within which a petition for rehearing shall be determined by the commission is fixed by statute in some states, being limited to thirty days after the same is finally submitted in Idaho,⁹ Missouri,¹⁰ and New York.¹¹ And it is sometimes expressly provided that no legal proceeding to contest any order or regulation of the commission can be taken until it acts upon an application for a rehearing as in Illinois,¹² and Nebraska.¹³

The action of the commission as to rates and other regulations is final and binding on all parties concerned and can only be modified or set aside by another order of the commission, for neither the public utility nor the public service commission has the power to modify or dispose of regulations or rates as to certain parties

⁹ Idaho Code 1932, § 59-626.

¹⁰ Missouri Rev. Stats. 1929, § 5233.

¹¹ New York Consol. Laws 1930, p. 1863, § 22.

¹² Smith-Hurd Illinois Rev. Stat. 1931, ch. 111½, §§ 71, 72.

¹³ Nebraska Comp. Stat. 1929, § 75-509.

and leave them in effect as to the public generally, for as the court said in the case of *State v. Public Service Comm.*, 315 Mo. 312, 286 S. W. 84, P. U. R. 1927A, 187: "A schedule of rates and charges filed and published in accordance with the foregoing provisions acquires the force and effect of law; and as such, it is binding on both the corporation and the public which it serves. It may be modified or changed only by a new or supplementary schedule, filed voluntarily, or by order of the commission. * * * If such a schedule is to be accorded the force and effect of law, it is binding, not only upon the utility and the public, but upon the public service commission as well. The general purpose of the statutory provision * * * is to compel the utility to furnish service to all the inhabitants of the district which it professes to serve at reasonable rates and without discrimination. * * * The rules and regulations of the St. Louis Gas Company as to extensions are integral parts of its schedule of rates and charges. If they are unjust and unreasonable, the commission, after a hearing, as just referred to, may order the schedule modified in respect to them. But it can not set them aside as to certain individuals and maintain them in force as to the public generally. * * * Neither can the public service commission."

§ 918. **Further hearings.**—While the commission has authority to make summary investigations, these are generally supplemented later by formal hearings on due notice, if in the opinion of the commission sufficient grounds exist to justify a further hearing, in which case it may be granted on motion of the commission itself or upon application by an interested party, as provided by statute in Indiana,¹⁴ Oregon,¹⁵ Maine,¹⁶ Wisconsin,¹⁷ and in the District of Columbia.¹⁸

§ 919. **Presumption favors orders of commissions.**—Ample provision is made for a full and thorough investigation of all material facts, after notice to interested parties, and a complete public hearing is held in connection with practically all proceedings of any commission, which serve as the basis of the findings and orders or regulations in the forty-eight or more jurisdictions which now have commissions. The commissions are created for

¹⁴ Burns' Stat. 1926, § 12732 et seq.

¹⁵ Oregon Code 1930, §§ 61-210, 61-241 et seq.; Oregon Laws 1931, ch. 103.

¹⁶ Maine Rev. Stat. 1930, p. 1042, §§ 51, 56.

¹⁷ Wisconsin Stat. 1931, § 196.26 et seq.

¹⁸ District of Columbia Code 1929, p. 389, § 68; 37 Stat. at L. 984, par. 45.

the sole and express purpose of making such investigations and issuing the proper orders thereon. The members of the commissions are selected and trained especially for this service to which they devote their exclusive time and attention. They are peculiarly fitted for such work and their findings and orders are very properly and necessarily presumed to be reasonable, lawful, and correct. The burden of proof is placed on the parties attacking their action, and unless the weight of evidence is clearly against the findings of the commissions their decisions will be sustained and their orders enforced on appeal to the courts, unless they are clearly illegal.

Under proper statutory authority, a public service commission generally has exclusive original jurisdiction to make such conditions as are reasonable and necessary in granting certificates for common carrier service by motor vehicles, and the courts will not entertain or decide the question prior to its decision and consideration by the commission, as was decided in *Griffon v. Villia*, 167 La. 683, 120 So. 50, where the court spoke as follows: "We have concluded that the district judge is correct in his opinion that the public service commission alone has original jurisdiction to determine whether the defendant should be compelled to take out accident insurance, furnish a bond, and obtain the certificate which is required of 'motor carriers,' by the Act 292 of 1926. * * * The authority of the legislature to declare 'motor carriers,' operating on the public highways, public utilities, and to place them under the control of the public service commission, was conferred by a provision in section 4 of article 6 of the Constitution. * * * It can not be doubted that, if this proceeding were against a railroad company or any other of the public utilities mentioned in the fourth section of article 6 of the Constitution, it would have to be brought originally before the public service commission, and an appeal from the commission's ruling in the matter could be had only by the filing of a suit against the commission, in the district court in East Baton Rouge parish—at the domicil of the commission. The same method of procedure is applicable to suits against other public utilities, which have been declared such and placed under the supervision, regulation, and control of the commission since the adoption of the constitution, pursuant to the authority conferred upon the legislature by the provisions of the second paragraph of the fourth section of article 6 of the Constitution."

Decision of the commission on questions concerning the rights of conflicting public utilities to serve a certain territory where

the decision tends to protect the existing service and is otherwise reasonable, will be sustained by the court, although a municipal public utility is attempting to extend its service outside the municipal limits, because as to such service municipally-owned plants are generally subject to commission regulation the same as those privately owned. This principle was established and discussed as follows in the case of *Public Utilities Comm. v. Loveland*, 87 Colo. 556, 289 Pac. 1090, P. U. R. 1931A, 212: "If the settled rule of this court is enforced in its strictness and fullness, this review must fall because the Utilities Act unmistakably and clearly invests the public utilities commission with the sole jurisdiction to hear and determine, in the first instance, a controversy of this nature, and the district court had jurisdiction of the parties, both of them appearing and submitting without question the settlement of the controversy then before the court. But it is not necessary to an approval of the orders of the commission in this case, and to a reversal of the judgment and decree of the district court which nullified the same, merely to say that in certiorari only jurisdictional questions may be considered in a determination by the district court of the propriety of the orders of the commission in this case; for it is clear from the record of the commission, on which alone the district court set aside its orders and dismissed the petition of the Public Service Company, that the district court's judgment was based upon an erroneous view of facts as well as law. * * * In the case now before us the district court upon its review did not have before it the question of rates, but only the propriety of the orders of the commission, which in effect prohibited the city from further maintaining or operating its facilities for supplying customers in the disputed territory outside the city limits with electricity for power and lighting purposes. * * * It should be borne in mind in considering cases under this statute that it was clearly the intention of our general assembly to give to the utilities commission complete control over public utilities so far as that could be done under existing constitutional limitations. * * * The record clearly shows, at least the utilities commission so found, and properly so we think, and the trial court so determined, that the field or territory which the city attempted to monopolize outside of its own municipal boundaries was just as contiguous to the preexisting facilities of the Public Service Company as to those of the city. The Service Company was first in the field. The very object of the provisions of the statute applicable here was to prevent, in the interests of the general public, unnecessary du-

plication of facilities or systems for furnishing the same to customers. When the city became a public utility under the statute, it had no superior right as to territory outside of its municipal boundaries over the rights of any other public utility, private corporation or otherwise, authorized to furnish service."

The attitude of our courts in favoring and sustaining the orders of the commission and in indulging all presumptions in favor of their validity and reasonableness was indicated in *Black Bus Line v. Henry*, 241 Ky. 602, 44 S. W. (2d) 580, where the court said: "But there is not the slightest inkling in the record made before the commissioner, including the evidence heard by him, to show any abuse of discretion. On the contrary, the testimony as so heard confirms his determination in every point decided by him, and this appeal appears to be confirmatory of but one fact, which is, that appellant was disappointed in not procuring the permit applied for instead of it being granted to his contesting applicant, the 'Kentucky River Coach Company'; but which disappointment alone furnishes no ground for a court to disturb the determination of the commissioner, and for which reason there was never any ground for the appeal prosecuted to the circuit court, nor for the one prosecuted to this one."

§ 920. **Conclusions of facts prima facie or final.**—By statute in California the findings and conclusions of the commission on questions of fact are made final and not subject to judicial review; and it is provided that questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination.¹⁹ In Colorado it is provided that the findings and conclusions of the commission on disputed questions of fact shall be final and shall not be subject to review by the courts.²⁰ The statutory provisions of Idaho make the findings and conclusions of the commission on questions of fact prima facie just, reasonable, and correct; such questions of fact to include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination.²¹ In Illinois the statute provides that the findings and conclusions of the commission on questions of fact shall be prima facie true, and their rules, regulations, orders, or decisions prima facie reasonable, thereby shifting the burden of proof on all issues, as is done in practically all other states, upon the party appealing there-

¹⁹ Deering's California Gen. Laws 1931, Act 6386, § 67.

²⁰ Colorado Comp. Laws 1921, § 2959 et seq.

²¹ Idaho Code 1932, § 59-625 et seq.

from.²² The New Hampshire statute provides that all findings of the commission upon all questions of fact properly brought before it shall be *prima facie* lawful and reasonable.²³ And in Pennsylvania the orders of the commission are made *prima facie* evidence of their reasonableness.²⁴

By express statutory authority, the findings and conclusions of the railroad commission of California are final and will not be reviewed by the courts, especially on matters of granting or withholding certificates for service, because public convenience and necessity may or may not justify additional service, unless clearly arbitrary and entirely unreasonable, for as the court said in the case of *San Diego & Coronado Ferry Co. v. Railroad Commission*, 210 Cal. 504, 292 Pac. 640, P. U. R. 1930E, 464: "Obviously there was a question presented to the commission on that issue, and, while the finding thereon is not as definite as might be desired, there is sufficient in the record to justify the conclusion that under all the circumstances appearing in the case, both from the standpoint of service and future business, the public interest would be subserved by the granting of the certificate, and that each company could operate at a profit. It is vital, then, to consider the scope of the power vested in this court to set aside an order of the commission under the record here presented. * * * The new policy proceeded generally on the theory of regulated monopoly. But it did not go the length of guarantying monopoly in all cases. Throughout the legislation runs the unbroken thread that the public interest is first to be considered. * * * By that section, the findings and conclusions of the commission on questions of fact are made final and not subject to review. Here the commission found the ultimate fact that the public convenience and necessity did not require the exercise of the privileges in controversy, and neither the sufficiency of the evidence, nor the soundness of the reasoning, upon which that finding was based, can be considered on this proceeding.' * * * The phrase 'public convenience and necessity' can not be defined so as to fit all cases. The word 'necessity' must be taken in a relative sense. * * * If it is of sufficient importance to warrant the expense of making it, it is a public necessity. * * * The discretion of the commission in such matters is very broad. * * * That reasonable minds might differ as to the wisdom of the order, il-

²² Smith-Hurd Illinois Rev. Stat. 1931, ch. 111½, § 72.

²³ New Hampshire Public Laws 1926, ch. 239, § 11.

²⁴ Pennsylvania Stat. 1920, § 18185.

lustrated by the fact that three members of the commission voted for the same with two dissenting, would tend to uphold rather than to destroy the order. We conclude that there is sufficient in the record to justify the decision."

The conclusions of facts and the wide discretion of the commission, if reasonably sustained by the evidence, are not subject to review by the court, as was indicated in the case of *In re Public Utilities Comm. Investigation*, 51 Idaho 56, 1 Pac. (2d) 627, where the court said: "It was demonstrated to be impossible for a twenty-nine-foot stage, such as the appellants Auto Interurban Company was then using on the highway, and an ordinary automobile, to pass within the eighteen-foot roadway on those turns. * * * We think there is evidence competent to sustain the above finding, which is the basis of the order. * * * However, the commission's judgment or discretion in such matters, if sustained by reasonable showing, is not subject to review by this court because, on appeal from a decision of the public utilities commission, the jurisdiction of the Supreme Court is limited to determining whether the commission has pursued its statutory authority and whether the order complained of infringes the constitutional rights of the appellants. * * * And it is quite generally held that the business of a common carrier of freight or passengers permitted upon the highways is regulatory independently of any police power supervising the ordinary and usual rights of citizens in the highway, and independent of the ordinary laws establishing rules of the road governing ordinary rights in and upon the highway."

Unless the commission has exceeded its jurisdiction or its decision has been unreasonable or arbitrary, in the absence of fraud, its rulings and orders will be sustained by the court and an appeal therefrom will be denied, especially where the party failed to avail itself of the remedies provided by the statute for a rehearing, for as the court said in the case of *Ashbury Truck Co. v. Railroad Comm. of California*, 52 Fed. (2d) 263: "In view of this finding, not only was the commission justified in awarding plaintiff a certificate to operate as a common carrier for the transportation of only the commodities specifically mentioned in its decision, but there was no finding which would have supported an order authorizing the latter to transport all classes of freight. * * * Regardless, therefore, whether a formal complaint should have been filed with the commission attacking plaintiff's right to such certificate, or whether it should have received notice to defend against such complaint, the fact remains

that the plaintiff consented to what might be termed a hearing de novo before the commission upon its application for a certificate. That the plaintiff could waive such requirements of procedure, and could submit itself to the jurisdiction of the commission to determine anew the matter of its application for a certificate, we have no doubt. No contention is made in the instant case that at such hearing de novo the plaintiff was prevented from introducing any evidence in support of its application, or in any respect deprived of the opportunity to present its application fairly and fully upon the merits. * * * Where such a hearing has been accorded, if no bias or fraud is shown, and if there is substantial evidence to support the same, the findings of an administrative body upon any matter within its jurisdiction are conclusive upon all parties, and are not subject to judicial review. *Interstate Commerce Commission v. Louisville & N. R. Co.*, 227 U. S. 88, 33 Sup. Ct. 185, 57 L. ed. 431; *Los Angeles Switching Case*, 234 U. S. 294, 34 Sup. Ct. 814, 58 L. ed. 1319. A judicial review of administrative action is limited to those cases where the record discloses either that the procedure followed contravenes those principles of fairness and justice required by due process of law, or that the administrative body involved has exceeded its jurisdiction. * * * In the action at bar, the plaintiff submitted de novo its application for certificate to the only administrative body having jurisdiction to grant the same, namely, the defendant herein; it has been accorded a hearing thereon in conformity with the requirements of due process of law; and the commission has made its findings and decision therein. No contention is made that such findings and decision are tainted with fraud or bias, nor can it be seriously urged that there is no substantial evidence supporting the same. Under these circumstances we hold that plaintiff has had its day in court, and may not now be heard to complain. Furthermore, it is admitted that, although under the laws of California the plaintiff had the right to apply to the defendant for a rehearing upon the orders of August 16 and December 1, 1927, respectively, by which orders it is claimed that plaintiff's right to a certificate was determined under conditions violative of its alleged vested rights, and although the latter was entitled to apply to the highest court of that state for relief in the event of a denial of a rehearing, nevertheless the plaintiff failed to resort to these remedies. Having neglected to avail itself of the remedies provided by the state law (St. Cal. 1915, p. 160, sections 66, 67) for the correction of

the alleged wrongful orders complained of, it follows that the bill filed herein is without equity."

The action of the federal radio commission in denying an application for a modification of an existing license, where supported by substantial evidence, is conclusive, unless such action is arbitrary or capricious or contrary to law, for on such appeals the court is limited to questions of law, as was indicated in the case of *Pacific-Development Radio Co. v. Federal Radio Comm.*, 55 Fed. (2d) 540, where the court said: "We are of the opinion that the application was not for a construction permit, but for modification of an existing station license, and that the refusal to grant it is made appealable by the two statutes * * *. The motion to dismiss the appeal is therefore overruled. It is provided by the Act of July 1, 1930, * * * that the review by this court in case of such an appeal shall be limited to questions of law, and that findings of fact by the commission, if supported by substantial evidence, shall be conclusive, unless it shall clearly appear that the findings of the commission are arbitrary or capricious. A review of the record convinces us that the decision in question is not contrary to law, nor is it arbitrary or capricious. * * * It appears, however, that the fifth zone already has assigned to it 91.08 units, or 11.08 units in excess of the allotment to which the zone is entitled under the commission's General Order No. 92. It appears also that the state of California now has assigned to it an excess of facility units as compared with the other states in the fifth zone, and furthermore that the granting of this application would tend to preclude the granting of other pending applications for broadcasting facilities in communities in the state which do not now have adequate service. The commission accordingly held upon the facts that the public interest, convenience, and/or necessity would not be served by granting the application for increased daytime power."

Unless there is an appeal from an order of the commission fixing maximum rates for the future for the purpose of determining whether they are reasonable or confiscatory, the order will be set aside where the evidence shows that it is unreasonable, and such a statute which fails to provide an appeal from the order is unconstitutional for that reason, as was indicated in the case of *Western Distributing Co. v. Public Service Comm. of Kansas*, 58 Fed. (2d) 239, where the court said: "In the recent case of *Wichita Gas Co. v. Public Service Commission*, 132 Kans. 459, 295 Pac. 668, the court held that the review under sections 66-118c and 66-118d, supra, was limited to questions of law and that the

court could not set aside a finding of fact if there was any evidence before the commission to sustain it. It is settled law that an order of a state commission fixing maximum future rates to be charged by a utility violates the due process clause of the federal Constitution, if no fair opportunity is provided by the state law for submitting the question, as to whether the rates are confiscatory, to the determination of a judicial tribunal upon its own independent judgment as to both law and fact. *Ohio Valley Water Co. v. Ben Avon Borough et al.*, 253 U. S. 287, 40 Sup. Ct. 527, 64 L. ed. 908. Counsel for defendants assert that sections 66-118c and 66-118d, *supra*, furnish an exclusive remedy for reviewing the order of the commission and that plaintiff, having invoked the jurisdiction of the commission to set aside an existing rate and to establish a fair rate, is now estopped to question the constitutionality of such sections. The construction urged by counsel for defendants would render these sections unconstitutional, since they make no provisions for judicial review of questions of fact."

§ 921. **Time and manner of taking appeals.**—Within a limited time, usually thirty days, after the final action of the commission, appeal therefrom lies either to the county or district court where the matter in question arose, or to the courts having jurisdiction where the commission sits or to the supreme or the court of last resort in the state. Appeals may be taken only within thirty days and directly to the Supreme Court in the state of California, where on review the court may only determine whether the commission has regularly pursued its authority and whether the order or decision being reviewed violates any constitutional right of the petitioner; and the judgment of the Supreme Court must either affirm or set aside the order or decision of the commission.

An appeal from the decision of the commission is perfected by filing with the commission security for costs, and no additional notice is necessary according to the usual statutory provisions, for as the court said in the case of *Alabama Public Service Comm. v. Lindsey*, 222 Ala. 243, 131 So. 796, P. U. R. 1931C, 183: "The order here sought to be reviewed relates solely to the matter of passenger fares or rates on a motorbus line. It is clearly within article 10, section 1931 et seq. Such appeal by the carrier is 'deemed perfected by the filing with the public service commission of security for costs of said appeal.' Code, section 9832. No additional notice of the appeal is required. The public service commission is the judicial tribunal whose judgment is being ap-

pealed from, and is at the same time a party to the suit on appeal. Hence filing the security for costs of appeal carries notice of the appeal. The certified transcript sent by the commission to the appellate court includes 'all pleadings, evidence, and orders.' Code, section 9833. The trial is *de novo*, but the transcript showing the subject-matter of the controversy, and the evidence heard by the commission, may be offered by either party. Other evidence may also be produced. * * * We can not concur with the attorney-general in the view that it was necessary to file a bill of complaint and bring in the commission by summons; nor that any other or further notice of the date set for trial was due the commission than to other parties having causes set down on the trial docket."

Unless the appeal is taken from the action of the commission within the time fixed by the statute, the right to appeal is lost, although the order appealed from concerned the granting of a certificate, to which the applicant may have been entitled. This principle was established and discussed as follows in the case of *Reynolds v. Alexandria Motor Bus Line*, 141 Va. 213, 126 S. E. 201: "If the applicant was actually operating in good faith over the proposed route on February 28, 1923, then he was entitled to the certificate 'as a matter of right.' As soon as this fact was made to appear to the satisfaction of the commission, the applicant was entitled to his certificate upon the terms prescribed by the rules of the commission. It was wholly immaterial what service was being furnished by other carriers. * * * In the instant case, the commission was entirely within its rights and powers in entering the order of July 7, 1923. The order of July 7, 1923, shows on its face that it was a final disposition of the case. It is wholly immaterial whether it was right or wrong. The commission had dismissed it, and no longer had any jurisdiction over it. * * * This necessitated an application for the certificate before the right became effective. The statute also contemplated that the service existing on February 28, 1923, should be continued up to the time the application was made. It was not intended to revive a service that had been abandoned. In the instant case, the application was made in due time, but was denied by the order of July 7, 1923. * * * In the instant case, the applicant apparently acquiesced in the order of July 7, 1923, dismissing its petition, and waited over seven months before it even suggested an objection. It could never have been the legislative intent to permit such conduct. The order of June 27, 1923, treated in its most favorable light to the applicant, was simply

an order stating that, upon the filing of a properly verified financial statement, 'the certificate would be issued.' It was not the issuance of a certificate, nor an unconditional order for the issue of a certificate, but a condition was annexed which was never fulfilled."

Appeals to the courts may be had only after the matter has been passed upon by the commission or department of public works and when the appeal has been perfected according to the method prescribed by the statute for appeals, as was indicated in *Addy v. Fruitdale-on-the-Sound Water Co.*, 164 Wash. 713, 3 Pac. (2d) 541, P. U. R. 1932A, 71, where the court said: "Many of the facts in connection with the history of the operations of the water company are stated in the opinion of this court in the case of *State ex rel. Addy v. Department of Public Works*, 158 Wash. 462, 291 Pac. 346, in which proceeding it was held that the water company had, because of its manner of doing business and the functions which it had been performing, come within the jurisdiction of the department of public works, and was subject as a public service corporation to regulation by the department.

* * * We conclude that the questions which exist in connection with the subject-matter of this litigation should properly, in the first instance, be passed upon by the department of public works, and that the order appealed from provides for a proper method by which the questions may be presented to that tribunal.

* * * Appellants, after complying with the terms of the decree, may, in the hearing before the department and in any subsequent proceedings, take any position they desire as to the order which should be made, without regard to whether or not such position is consistent or inconsistent with the application which they make to the department in compliance with the interlocutory decree which is hereby affirmed."

§ 922. **Jurisdiction of court on appeals.**—In Colorado the right of appeal is likewise limited to the Supreme Court which has authority, in addition to that granted the California²⁵ court, to determine whether the order of the commission is just and reasonable and whether its conclusions are in accordance with the evidence, and the court may affirm, set aside or modify the order or decision of the commission.²⁶ Provisions for review by appeal to the Supreme Court are made by the statutes of Idaho where, however, the judgment of the court must either affirm or set

²⁵ Deering's California Gen. Laws 1931, Act 6386, § 67.

²⁶ Colorado Comp. Laws 1921, § 2961.

aside the action of the commission.²⁷ In Maine the right of appeal is expressly limited to a decision by the Supreme Court on questions of law, submitted on an agreed statement of facts, found by the commission which, together with copies of the arguments of counsel, must be filed with the court.²⁸ The supreme judicial court of Massachusetts is given jurisdiction in equity to review, annul, modify or amend rulings and orders of the commission in so far as they are unlawful.²⁹

The jurisdiction of the court on appeal is generally limited to a reversal or affirmance of the order of the commission. The court may not modify the order or substitute its judgment for that of the commission under the statutory authority provided in most jurisdictions, for as the court said in *State v. Brown*, 326 Mo. 230, 31 S. W. (2d) 208, P. U. R. 1931C, 246: "This order is not supported by the finding of facts. The commission found that respondent should be authorized to accept passengers originating at Chadwick and at points between Chadwick and Sparta for transportation to any point between Chadwick and Springfield, but the order made by the commission prohibits respondent from transporting such passengers between Sparta and Springfield unless their destination was Ozark. * * * Although the order of the commission must be reversed for reasons already stated, we deem it proper to call attention to the fact that the judgment of the circuit court was erroneous in that it attempted to substitute its judgment for the judgment of the commission by authorizing respondent to receive and discharge passengers at all points along the proposed route. The authority of the circuit court is limited to an affirmance or reversal of the order of the commission."

While parties affected by the rates fixed by the commission may not have been actual parties to the rate petition, they are bound by the order of the commission fixing the rates and have the right to petition the commission for a rehearing in the matter; and if this is denied, they may petition the court for a review of the order fixing the rate. A decision of the court is binding on all parties affected by the order fixing the rate, and where the decision involves the construction of a statute of the state, it is binding on the federal court, which is accordingly without jurisdiction in the matter, unless a federal question is also involved, for as the court said in the case of *Wallace Ranch Water*

²⁷ Idaho Code 1932, § 59-627 et seq.

²⁹ Massachusetts Gen. Laws 1921, ch. 25, § 5.

²⁸ Maine Rev. Stat. 1930, p. 1046, § 63.

Co. v. Railroad Comm. of California, 47 Fed. (2d) 8, P. U. R. 1931D, 78: "It is well settled that the denial of a petition for review by the Supreme Court of the state in this class of cases is in effect an affirmance of the order sought to be reviewed. * * * And, if the denial of the petition is an affirmance of the order on the merits, it would seem that it is likewise an affirmance of the right of the petitioner to invoke the jurisdiction of the Supreme Court. If so, that affirmance involved the construction of a statute of the state, and that construction is binding on a federal court sitting within the state. * * * In the original order the commission found that the appellant stood in the same relation to the utility as any other consumer or user, and should pay the same rates and charges. This decision was adhered to on the rehearing. The appellant therefore stood in relation to the utility in the same position as any other user or consumer, and was entitled to the same rights and remedies. An application for an increase in rates is made to the commission *ex parte*, and, while those affected by the rates are not parties to the proceeding in name, they are in legal effect, and are bound by the rates established. They therefore have a right to petition the commission for a rehearing and to petition the Supreme Court for a review if the petition for rehearing is denied. *Clemmons v. Railroad Commission*, 173 Cal. 254, 159 Pac. 713. For these reasons, the adjudication by the state court was binding upon the appellant, subject only to a review by the Supreme Court of the United States. * * * Here there was no basis whatever for invoking the jurisdiction of the federal court in the first instance, because the identical right asserted had been repeatedly decided by the Supreme Court adversely to the contention made by the appellant. Under such circumstances, the federal question has ceased to be one of substance, and the federal court is without jurisdiction for any purpose."

As questions of law belong to the court and not to the commission, a definition and determination of the legal effect of the transfer or lease of a permit is a matter for the court to determine, as was indicated in *Red Eagle Bus Co. v. Public Utilities Comm.*, 124 Ohio St. 625, 180 N. E. 261: "The courts of other states have refused to recognize the lease of a personal license. While none of these cases is sufficiently parallel in the facts to be decisive of the question in the instant case, they do throw light upon the general proposition that a personal license is not subject to lease. It is claimed that sections 614-2a, and 614-60 are authority for leasing a certificate, but a careful examination of

those sections leads inevitably to the conclusion that they refer to leases of property, including franchises, but not mere licenses. If the southern portion of territory covered by certificate No. 7 were subject to lease, the procedure followed by the commission would be correct, but, if subject only to transfer, it involves a shortening of the route and readjustment of service, and section 614-91 applies. We have reached the conclusion that it is subject to transfer only, and the order of the commission will therefore be reversed, and the cause remanded."

Appeals to the federal court are available in spite of a state statute to the contrary, and although a private carrier can not be converted into a common carrier by legislative fiat neither can a common carrier by a mere subterfuge of a contract convert itself into a private carrier, for the nature of the service determines the question rather than the contracts of the carrier, as the court said in the case of *Denver & Rio Grande Western R. Co. v. Linck*, 56 Fed. (2d) 957: "The state can not, even if it so desired, deprive the federal courts of their equity jurisdiction to grant injunctions in proper cases. *Pacific Telephone & Telegraph Co. v. Kuykendall*, 265 U. S. 196, 44 Sup. Ct. 553, 68 L. ed. 975. Property rights may be protected by use of the injunction where an interference therewith will result in great or irreparable injury, and the use of an injunction is the appropriate remedy to protect a party in the enjoyment of an exclusive franchise against encroachment. * * * Certainly a private carrier can not be subjected to the requirements of a common carrier, but a person can not, by the execution of a contract, change the character of his operations from those of a common carrier to those of a private carrier. * * * We, therefore, conclude that the Linck operations are in substance those of a common carrier, and that the Scowcroft contract was a mere subterfuge, and that by reason thereof appellants should have the injunction sought by them as against Linck and those associated with him in the operation under the Scowcroft contract."

§ 923. Right and manner of appeal and power of disposition by court.—Interested parties who are dissatisfied with the action of the commission in Nebraska may resort to the Supreme Court which may reverse, vacate, or modify such action.³⁰ In New Hampshire provision is made for appeal direct to the Supreme Court which shall not set aside the order or decision of the commission except for errors of law, unless the court is clearly satis-

³⁰ Nebraska Comp. Stats. 1929,
§ 75-505.

fied under the evidence that the order is unjust and unreasonable, when in its judgment the court must dismiss the appeal or vacate the order in whole or in part; in which case the matter may be remanded to the commission for such further proceedings not inconsistent with the judgment, as in the opinion of the commission equity may require.³¹ Review of the proceedings of the commission by the Supreme Court alone is also provided for in New Jersey,³² New Mexico,³³ Ohio,³⁴ Oklahoma,³⁵ Rhode Island,³⁶ Vermont,³⁷ Virginia,³⁸ and in West Virginia.³⁹

Pending an appeal in at least most jurisdictions, the public utility can not file further schedules changing the rates fixed by a former order from which the appeal was taken, for if additional schedules were filed pending the appeal, confusion would inevitably be the result and the effect of the decision on appeal would naturally be questionable, for as the court said in the case of *Logan Gas Co. v. Public Utilities Comm.*, 115 Ohio St. 107, 152 N. E. 648, P. U. R. 1926D, 769: "The single question presented in this case is whether the Logan Gas Company has the right to file a second schedule, Schedule No. 8, establishing further increased rates during the pendency of the hearing as to the reasonableness of the rates shown by Schedule No. 7 * * *. Hence if the utility is permitted to file this second schedule for the purpose of demanding different rates from those contained in Schedule No. 7, it will be violating the spirit and intention of section 614-18, because the first schedule has been filed with the commission and is in effect at this time. * * * If it can prepare one new schedule, before the hearing upon the first one under investigation is completed it can prepare several. Moreover, the cities which did not protest the first rates, and have protested the second rates, could not be bound by the testimony used in the first hearing. It may be questioned whether the commission could consolidate the separate proceedings upon the separate schedules. If it could not, the filing of successive schedules under the circumstances set forth herein would lead to endless administrative confusion."

As rights of appeal are statutory, unless the provisions of the statute are complied with, the appeal fails, as was indicated in

³¹ New Hampshire Public Laws 1926, ch. 239, § 4 et seq.

³² New Jersey Comp. Stat. Supp. 1925, § 167-58.

³³ New Mexico Const., art. 11, § 7.

³⁴ Throckmorton's Ohio Gen. Code 1930, § 544 et seq.

³⁵ Oklahoma Const., art. 11, § 20.

³⁶ Rhode Island Gen. Laws 1923, § 3697.

³⁷ Vermont Gen. Laws 1917, § 4991.

³⁸ Virginia Const., § 156.

³⁹ West Virginia Code 1931, p. 677.

Barth v. Lincoln Tel. & T. Co., 122 Nebr. 325, 240 N. W. 318, where the court said: "The Lincoln Telephone & Telegraph Company, a Nebraska corporation, appellee herein, filed its application with the Nebraska state railway commission for authority to place into effect a revised and advanced schedule of rates at its telephone exchange in the city of Seward, after rebuilding its plant and converting the same from a manual to an automatic system. * * * When a motion for a new trial is a necessary step to perfect an appeal from the district court to this court, such motion, when no question of newly-discovered evidence is involved, must be made within three days from the date the decision is rendered unless 'unavoidably prevented.' * * * No finding by the railway commission that appellants were 'unavoidably prevented' from filing their motion for new trial within three days after the findings and decision of the railway commission from which they seek to appeal, appears in the record. * * * Whether a motion for a new trial was a necessary step in order to obtain a review of the findings and decision of the state railway commission is not decided; but, if it was necessary, such motion was not filed within the time limited by the code and was, therefore, of no avail."

§ 924. **Connecticut rule on appeals.**—Within thirty days after final action by the Connecticut commission, an appeal lies to the superior court of the county in which the matter arose, or if the question is not local, to the court of Hartford County, the seat of the commission. The decision of this local court is made conclusive, subject to review by the Supreme Court for errors on questions of law.⁴⁰

Under the statutory provisions of Connecticut, the attorney-general is required to institute proceedings for the removal of commissioners who fail to perform their statutory duties, and as this decision is mandatory, the court will enforce it as was indicated in *Levitt v. Attorney General*, 111 Conn. 634, 151 Atl. 171: "The case before us is not a review of the exercise of discretion by the commission, but an application seeking the institution of legal proceedings by the attorney-general for the failure of the commissioners to comply with these statutory requirements when the railroads have not removed a single grade crossing in the five years prior to the filing of plaintiff's petition with the attorney-general. The case is one for a violation by the commission of its statutory duty to order the removal of these

⁴⁰ Connecticut Gen. Stat. 1930,
§ 3608 et seq.

grade crossings during this period in which it is alleged and contended that the financial condition of the railroad would have warranted their removal by it. * * * The public utilities commission was created by the general assembly. The power which creates has the power to remove, in the absence of constitutional or statutory provision to the contrary, of which there was none in this state at the creation of this commission. * * * Having the exclusive power of removal, the general assembly may prescribe the method and manner of removal which it has done in section 3614. *State ex rel. Engelke v. Kilmartin*, 86 Conn. 56, 84 Atl. 100, supra; *State ex rel. v. Prater*, 48 N. Dak. 1240, 189 N. W. 334, supra. It is true it has in many instances given this power to the governor. It had the right to itself retain its power in this particular instance. This it did by the method it adopted providing for a finding of the cause by the superior court and authorizing a judgment to follow such finding, and thereupon, automatically, providing that the office should become vacant."

§ 925. **Jurisdiction on appeals.**—In Georgia the court of Fulton County, the domicil of the commission, is given exclusive jurisdiction of appeals, except that the Supreme Court may be resorted to in enforcing penalties,⁴¹ as also in Alabama,⁴² and Arizona where the judgment of the local court is final unless notice of appeal therefrom is given in thirty days.⁴³ Within thirty days after action by the commission and a hearing or petition therefor under the statutes of Illinois appeal lies to the circuit court of Sangamon County, the seat of the commission, and from its decision to the Supreme Court within sixty days.⁴⁴ Similar provisions for appeal to the court in which the commission sits and thence to the Supreme Court of the state are made in Louisiana,⁴⁵ North Carolina,⁴⁶ Pennsylvania,⁴⁷ and Wisconsin.⁴⁸

§ 926. **Practice on appeals in Indiana and elsewhere.**—In Indiana the appeal lies within sixty days to the court of any county in which the order is operative and thence within sixty days to the Supreme Court. A transcript of the evidence and all the proceedings of the commission, as in most states, constitutes the record on appeal and the commission is required to file a certified

⁴¹ Georgia Code 1926, § 2667.

⁴² Alabama Civil Code 1928, § 9679 et seq.

⁴³ Arizona Rev. Code 1928, § 720.

⁴⁴ Smith-Hurd Illinois Rev. Stat. 1931, ch. 111½, §§ 72, 73.

⁴⁵ Louisiana Const., art. 285.

⁴⁶ North Carolina Code 1931, §§ 1097-1101.

⁴⁷ Pennsylvania Stat. 1920, § 18192.

⁴⁸ Wisconsin Stat. 1931, § 196.41 et seq.

copy of such transcript with the clerk of the court before trial. The answer of the commission to the complaint or petition on appeal must be filed ten days after it is served with notice of the appeal, and all such actions are given precedence over other civil cases. If evidence is introduced in the trial on appeal which the court finds to be different from that considered by the commission or is additional thereto, unless by agreement the parties stipulate to the contrary, the court must transmit a copy of such evidence to the commission and stay court proceedings for fifteen days. After considering such evidence the commission may sustain, modify, or revoke its order and must report its action thereon to the court in ten days. The judgment of the court is then rendered in the case as modified, if any, by the commission.⁴⁹ Similar provisions as to additional or different evidence being transmitted to the commission, pending the consideration of which the court stays its proceedings, are made by statute in the District of Columbia,⁵⁰ Maryland,⁵¹ Michigan,⁵² Montana,⁵³ Nevada,⁵⁴ New Hampshire,⁵⁵ Oregon,⁵⁶ and Wisconsin.⁵⁷

§ 927. **Additional evidence and affidavits.**—Where new or different evidence is discovered in Pennsylvania the case may be remanded to the commission.⁵⁸ In this state it is interesting to note that the party taking the appeal must make affidavit that it is not taken for the purpose of delay but in the belief that injustice has been done. In Illinois, if the commission refuses to receive proper evidence, the court must remand the case to the commission with instructions to receive the same and enter a new order based upon all the evidence.⁵⁹ In Massachusetts a petition for appeal must be accompanied by a certificate of opinion that the case is a proper one for judicial inquiry and that the appeal is not intended for delay, and in the event the court finds to the contrary it shall assess double costs upon such appellant.⁶⁰

⁴⁹ Burns' Indiana Stat. Supp. 1929, § 12752.

⁵⁰ District of Columbia Code 1929, p. 392, § 92; 37 U. S. Stat. at L. 989, par. 69.

⁵¹ Maryland Code 1924, art. 23, § 405.

⁵² Michigan Comp. Laws 1929, § 11715.

⁵³ Montana Rev. Code 1921, § 3906.

⁵⁴ Nevada Comp. Laws 1929, § 6953.

⁵⁵ New Hampshire Public Laws 1926, ch. 239, § 12 et seq.

⁵⁶ Oregon Code 1930, § 61-256.

⁵⁷ Wisconsin Stat. 1931, § 196.44 et seq.

⁵⁸ Pennsylvania Stat. 1920, § 18187.

⁵⁹ Smith-Hurd Illinois Rev. Stat. 1931, ch. 111½, § 72.

⁶⁰ Massachusetts Gen. Laws 1921, ch. 25, p. 97, § 5.

§ 928. **Orders of commissions effective pending appeals.**—By constitutional provision as well as statutory enactment in Arizona the rules, regulations, orders, and decrees of the commission remain in force pending the decision of the courts.⁶¹ In Florida it is expressly provided by statute that all orders, judgments, or decrees of inferior courts in favor of the commission shall remain effective until finally disposed of by the appellate court.⁶² The constitution of Louisiana provides also that orders of the commission shall remain in force until set aside by the final judgment of a court of competent jurisdiction.⁶³ In Montana all rates fixed by the commission remain in full force and effect until final determination by courts having jurisdiction,⁶⁴ and when a rate which has been effective for a year or more is advanced,⁶⁵ the order of the commission, reinstating the former rate in whole or in part,⁶⁶ may not be suspended pending the final determination of the matter by the courts, according to the provisions of the statutes in Illinois,⁶⁷ and in Washington.⁶⁸

An order of the commission has the force and effect of a judgment and is equally binding, under the statutory provisions in most jurisdictions, until reviewed by the court, as was indicated in the case of *Smith v. State*, 218 Ala. 669, 120 So. 471, P. U. R. 1929C, 338, where the court said: "This order of the commission was not a mere administrative regulation. On collateral attack, as here, this order had all the attributes of a judgment of a court of law. * * * This petitioner has not sought to review the order of the commission in the manner prescribed by the act; his plan is to ignore it. By his course he has subjected himself to the pains and penalties denounced by section 45 of the act, which is quoted in the opinion of the court of appeals. The constitutional validity of the act is not questioned. Its wisdom was a matter for consideration by the legislature. Nor can we in this proceeding consider the question whether the commission erred in its finding that petitioner was a common carrier. It results that the judgment of the court of appeals must be held for error. The cause is remanded to that court for further proceeding in agreement with this opinion."

⁶¹ Arizona Const., art. 15, § 17;
Arizona Rev. Code 1928, § 720.

⁶² Florida Comp. Gen. Laws 1927,
§ 6749.

⁶³ Dart's Louisiana Const. 1932,
art. 6, § 5.

⁶⁴ Montana Rev. Code 1921,
§ 3905.

⁶⁵ *Smith-Hurd Illinois Rev. Stat.*
1931, ch. 111½, § 75.

⁶⁶ *Remington's Washington Comp.*
Stat. 1922, § 10429.

⁶⁷ *Smith-Hurd Illinois Rev. Stat.*
1931, ch. 111½, § 75.

⁶⁸ *Remington's Washington Comp.*
Stat. 1922, § 10429.

§ 929. Appeals may stay effect of orders.—In Connecticut, however, appeals supersede the order or decision appealed from as a rule, although the court may order to the contrary if the appeal is for purposes of delay, or if justice, public safety, or expediency may require;⁶⁹ and this same provision is made by statute in Rhode Island;⁷⁰ while in Tennessee the rate, rule, order, or regulation is suspended only in the discretion of the court, and when a good and sufficient bond, in an amount fixed by the court, is furnished, conditioned for indemnity for any injury resulting by reason of the granting of such supersedeas.⁷¹

In the absence of an express provision of the Federal Radio Act providing for the stay of the orders of the commission on appeal, the court will refuse to find such a power by implication, and an attempt to stay such an order will be enjoined, especially where it appears that such a proceeding would be against the public welfare and would only operate for the private advantage of an individual. This principle was established and discussed as follows in the case of *General Broadcasting System v. Bridgeport Broadcasting Station*, 53 Fed. (2d) 664: "It is well known that in 1927 the condition of the radio broadcasting industry was chaotic, in view of the multiplicity of broadcasting stations which had sprung into being and the lack of regulatory authority to prevent disastrous interference. To relieve the tortured state of the ether, it was imperative that regulation, above all, should be prompt. A decision of the radio commission, subject to stay pending appeal, would have been a form of regulation lacking the promptness required by the exigencies of the situation. The very history of this case illustrates that point. Moreover, the act itself contains language indicating that congress did not intend that the decisions of the commission should be stayed by the court of appeals pending appeal. * * * It thus appears very clearly that in this case the basis of the stay order was not the welfare of the radio public, but rather the private rights of the appellant. * * * Thus tested by every applicable rule of statutory construction, power in the court of appeals to stay orders of the radio commission is not to be found by implication or otherwise in the Radio Act of 1927. It results that the stay order in equity No. 2066 was without operative effect, and the injunction therein alone operated to exclude WICC from the use of the frequency legally allocated to it by the decision of the commission.

⁶⁹ Connecticut Gen. Stat. 1930, § 3612.

⁷⁰ Rhode Island Gen. Laws 1923, § 3698.

⁷¹ Tennessee Code 1932, § 9017.

WGBS, by failure to sustain its right to the injunctive relief which it sought, has breached the condition of the injunction bond. * * * Since the stay order in question was made without any security whatever, its issue was necessarily not in the exercise of any power inherent in the court of appeals in its judicial capacity."

§ 930. Orders may be enjoined on notice and hearing with giving of bond.—As a general rule in most jurisdictions having commissions their orders and regulations may be enjoined by the courts, after a hearing and notice, upon good cause shown and the giving of sufficient bond to cover costs and damages resulting in case the action for injunction was not well founded and the order is finally sustained; but the fact that a writ of appeal or review is pending does not suspend the order or regulation. In addition to the ordinary cost bond which is generally required as a condition of granting an injunction and suspending the order of the commission, the statutes in a number of jurisdictions having commissions, provide for the giving of a supersedeas or suspending bond conditioned and sufficient in amount to insure the prompt and complete refunding to all parties entitled thereto of all charges or rates for service paid in excess of the rate fixed by the commission and sustained by the courts on review. Verified accounts showing the amount of such excess rates and from whom received and to whom payable are often required of all parties as a condition of the suspension of any order or rate regulation of the commission, as is expressly provided in California,⁷² Colorado,⁷³ Idaho,⁷⁴ Illinois,⁷⁵ Missouri,⁷⁶ Nebraska,⁷⁷ Ohio,⁷⁸ Oklahoma,⁷⁹ Oregon,⁸⁰ Pennsylvania,⁸¹ South Dakota,⁸² and Washington.⁸³ In New Hampshire the conditions for securing the repayment of the amounts received under excessive rates to the parties originally paying the same are fixed by the court, and a failure to make such repayments promptly as provided by the court is punishable as a contempt of court.⁸⁴

⁷² Deering's California Gen. Laws 1931, Act 6386, § 68.

⁷³ Colorado Comp. Laws 1921, § 2962.

⁷⁴ Idaho Code 1932, § 59-637.

⁷⁵ Smith-Hurd Illinois Rev. Stat. 1931, ch. 111½, § 75.

⁷⁶ Missouri Rev. Stat. 1929, § 5235.

⁷⁷ Nebraska Comp. Stat. 1929, § 75-505.

⁷⁸ Throckmorton's Ohio Gen. Code 1930, § 548.

⁷⁹ Oklahoma Const., art. 9, § 21.

⁸⁰ Oregon Code 1931, § 61-255.

⁸¹ Pennsylvania Stat. 1920, § 18181.

⁸² South Dakota Comp. Laws 1929, § 9591.

⁸³ Remington's Washington Comp. Stat. 122, § 10429.

⁸⁴ New Hampshire Public Laws 1926, ch. 239, § 20 et seq.

§ 931. **Conclusiveness of orders determines effectiveness of commission control.**—The effectiveness of the orders of the commission and the extent of its control are largely determined by the conclusiveness of its findings and the validity of its orders pending appeals taken therefrom. Since the action of the commission is presumptively correct, its orders are generally not suspended while an appeal for judicial review is pending, except on motion of the commission or by the court after notice and the giving of sufficient bond. For the commission to be most efficient and of the greatest practical value, many of its orders and regulations issued after due investigation should become and remain effective with the final disposition of the commission. The necessary delay attending reviews by the courts and their lack of time and opportunity for investigating situations at first hand and as current operating concerns constitute at once the occasion and the chief reason for commission control. Suspending their orders, pending appeals and while the same are being reviewed by the different courts, interferes materially with the effectiveness of the commission, detracts from the validity of its action and often postpones indefinitely the enjoyment of the results of its investigations and findings.

§ 932. **Attitude of courts toward commission determines effectiveness of its control.**—The effectiveness of the control of municipal public utilities by state commissions is largely determined by the attitude of the courts in their construction of the public utility acts and in their review of commission findings and orders on appeal. The fact that public utility commissions are practical business necessities and entirely consistent with constitutional rights has been fully recognized by all the courts which have been called upon to construe these statutory enactments, and their decisions freely admit that such state commissions are necessary administrative agencies and furnish the most satisfactory solution of the many intricate and comprehensive business questions that are constantly arising in increasing numbers in connection with the regulation and control of public utilities, which everyone now regards as natural monopolies and every-day business necessities.⁸⁵

⁸⁵ United States. *Baltimore & R. Co. v. Grant*, 98 U. S. 398, 25 L. ed. 231; *Chicago, M. & C. R. Co. v. State of Minnesota*, 134 U. S. 418, 33 L. ed. 970, 10 Sup. Ct. 462, 702; *Reagan v. Farmers Loan & C. Co.*,

154 U. S. 362, 38 L. ed. 1014, 14 Sup. Ct. 1047; *Cincinnati, N. O. & C. R. Co. v. Interstate Commerce Comm.*, 162 U. S. 184, 40 L. ed. 935, 16 Sup. Ct. 700; *Texas & P. R. Co. v. Interstate Commerce Comm.*, 162 U. S.

197, 40 L. ed. 940, 16 Sup. Ct. 666; Interstate Commerce Comm. v. Alabama M. R. Co., 168 U. S. 144, 42 L. ed. 414, 18 Sup. Ct. 45; Cincinnati, H. & D. R. Co. v. Interstate Commerce Comm., 206 U. S. 142, 51 L. ed. 995, 27 Sup. Ct. 648; Illinois Cent. R. Co. v. Interstate Commerce Comm., 206 U. S. 441, 51 L. ed. 1128, 27 Sup. Ct. 700; Prentiss v. Atlantic Coast Line Co., 211 U. S. 210, 53 L. ed. 150, 29 Sup. Ct. 67; Interstate Commerce Comm. v. Illinois Cent. R. Co., 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. 155; Interstate Commerce Comm. v. Northern P. R. Co., 216 U. S. 538, 54 L. ed. 608, 30 Sup. Ct. 417; Southern Pac. T. Co. v. Interstate Commerce Comm., 219 U. S. 433, 55 L. ed. 283, 31 Sup. Ct. 288; Interstate Commerce Comm. v. Union Pac. R. Co., 222 U. S. 541, 56 L. ed. 308, 32 Sup. Ct. 108; Interstate Commerce Comm. v. Louisville & C. R. Co., 227 U. S. 88, 57 L. ed. 431, 33 Sup. Ct. 185; Louisville & C. R. Co. v. Garrett, 231 U. S. 298, 58 L. ed. 229, 34 Sup. Ct. 48; Chicago, B. & Q. R. Co. v. Railroad Comm. of Wisconsin, 237 U. S. 220, 59 L. ed. 926, 35 Sup. Ct. 560; Ex parte Lincoln Gas & C. Co., 257 U. S. 6, 66 L. ed. 101, 42 Sup. Ct. 2; Newton v. New York & C. Gas Co., 258 U. S. 178, 66 L. ed. 549, 42 Sup. Ct. 268; Newton v. Kings County Lighting Co., 258 U. S. 180, 66 L. ed. 550, 42 Sup. Ct. 268; Wichita R. & Light Co. v. Public Utilities Comm., 260 U. S. 48, 67 L. ed. 124, 43 Sup. Ct. 51, P. U. R. 1923B, 300; Keller v. Potomac Elec. Co., 261 U. S. 428, 67 L. ed. 731, 43 Sup. Ct. 445; Prendergast v. New York Tel. Co., 262 U. S. 43, 67 L. ed. 853, 43 Sup. Ct. 466, P. U. R. 1923C, 719; Georgia R. & Power Co. v. Railroad Comm. of Georgia, 262 U. S. 625, 67 L. ed. 1144, 43 Sup. Ct. 680, P. U. R. 1923D, 1; Bluefield Water Works & Co. v. Public Service Comm., 262 U. S. 679, 67 L. ed. 1176, 43 Sup. Ct. 675; Pacific Tel. & T. Co. v. Kuykendall, 265 U. S. 196, 68 L. ed. 975, 44 Sup. Ct. 553; Home Tel. & T. Co. v. Kuykendall, 265 U. S. 206, 68 L. ed. 982, 44 Sup. Ct. 557;

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Pac. 493; Oklahoma Nat. Gas Co. v. Corporation Commission, 90 Okla. 84, 216 Pac. 917, P. U. R. 1924A, 132; Bristow Commercial Club v. Bristow Gas Co., 95 Okla. 4, 217 Pac. 201, P. U. R. 1923E, 841; Consumers Gas Co. v. Corporation Commission, 95 Okla. 57, 219 Pac. 126, P. U. R. 1924A, 743; Okmulgee Gas Co. v. Corporation Commission, 95 Okla. 213, 220 Pac. 28, P. U. R. 1924B, 249; Tulsa v. Corporation Commission, 96 Okla. 180, 221 Pac. 1000, P. U. R. 1924B, 767; McAlester Gas & C. Co. v. Corporation Commission, 102 Okla. 118, 227 Pac. 83; Ex parte Tindall, 102 Okla. 192, 229 Pac. 125; American Indian Oil & C. Co. v. Poteau, 108 Okla. 215, 235 Pac. 906, P. U. R. 1926A, 236; Pressure Oil & C. Co. v. Tri-City Gas Co., 108 Okla. 248, 236 Pac. 41; Oklahoma Nat. Gas Co. v. State, 110 Okla. 297, 236 Pac. 893; Eagle-Pitcher Lead Co. v. Henryetta Gas Co., 112 Okla. 65, 239 Pac. 890, P. U. R. 1926A, 659; Western Oklahoma Gas & C. Co. v. State, 113 Okla. 126, 239 Pac. 588, P. U. R. 1926B, 505; Shaffer Oil & C. Co. v. Creek County Gas Co., 114 Okla. 258, 246 Pac. 630, P. U. R. 1926E, 289; Mullendore Gas Co. v. Stillwater, 120 Okla. 140, 250 Pac. 895, P. U. R. 1927C, 49; Western Oklahoma Gas & C. Co. v. Duncan, 120 Okla. 206, 251 Pac. 37, P. U. R. 1927C, 277; Hohman v. State, 122 Okla. 45, 250 Pac. 514; Chicago, R. I. & C. R. Co. v. State, 123 Okla. 31, 251 Pac. 1044; Chicago, R. I. & C. R. Co. v. State, 123 Okla. 190, 252 Pac. 849; Chicago, R. I. & C. R. Co. v. State, 126 Okla. 48, 258 Pac. 874, P. U. R. 1928A, 255; Kansas, O. & C. R. Co. v. State, 127 Okla. 240, 260 Pac. 468, P. U. R. 1928A, 825; Riggs v. Leninger, 137 Okla. 138, 278 Pac. 344; Oklahoma-Arkansas Tel. Co. v. Southwestern Bell Tel. Co., 143 Okla. 76, 291 Pac. 3, P. U. R. 1930D, 400; Oklahoma Union R. Co. v. State, 146 Okla. 92, 293 Pac. 537; Cushing v. Consolidated Gas Utilities Co., 141 Okla. 82, 284 Pac. 38; American Indian Oil & C. Co. v. Collins (Okla.), 9 Pac. (2d) 438.

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(Tex. Civ. App.), 257 S. W. 616; Texas Motor Coaches v. Railroad Commission (Tex. Civ. App.), 41 S. W. (2d) 1074, P. U. R. 1932B, 295; Railroad Commission v. Rau (Tex. Civ. App.), 45 S. W. (2d) 413.

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Virginia. Louisville & N. R. Co. v. Interstate R. Co., 107 Va. 225, 57 S. E. 654; Norfolk & W. R. Co. v. Interstate R. Co., 114 Va. 789, 76 S. E. 940; Petersburg Gas Co. v. Petersburg, 132 Va. 82, 110 S. E. 533, 20 A. L. R. 542, P. U. R. 1922C, 172; Commonwealth v. Shenandoah River Light &c. Corp., 135 Va. 47, 115 S. E. 695, P. U. R. 1923C, 593; Roanoke Water Works Co. v. Commonwealth, 137 Va. 348, 119 S. E. 268; Roanoke Waterworks v. Commonwealth, 140 Va. 144, 124 S. E. 652; Gruber v. Commonwealth, 140 Va. 312, 125 S. E. 427; Richmond v. Virginia R. & Power Co., 141 Va. 69, 126 S. E. 353; Norfolk R. Co. v. Commonwealth, 141 Va. 179, 126 S. E. 82; Reynolds v. Alexandria Motor Bus Lines, 141 Va. 213, 126 S. E. 201; Ex parte Norfolk R. & Light Co., 142 Va. 323, 126 S. E. 602, P. U. R. 1926A, 98; Hampton v. Newport News &c. Elec. Co., 144 Va. 24, 131 S. E. 330; Chesapeake &c. Tel. Co. v. Commonwealth, 147 Va. 43, 136 S. E. 575, P. U. R. 1927B, 484; Petersburg, H. &c. R. Co. v. Commonwealth, 152 Va. 193,

146 S. E. 292, P. U. R. 1929C, 235; Southside Transp. Co. v. Commonwealth (Va.), 161 S. E. 895.

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Pac. 1074; North Coast Transp. Co. v. Department of Public Works, 157 Wash. 79, 288 Pac. 245; Denman v. Department of Public Works, 157 Wash. 447, 289 Pac. 34, 291 Pac. 1115; Puget Sound Navigation Co. v. Director of Public Works, 157 Wash. 557, 289 Pac. 1006, P. U. R. 1930E, 289; State v. Department of Public Works, 158 Wash. 462, 291 Pac. 346, P. U. R. 1931B, 184; Washington Motor Coach Co. v. Baker, 158 Wash. 588, 291 Pac. 733; North Bend State Line, Inc. v. Department of Public Works, 162 Wash. 46, 297 Pac. 780, P. U. R. 1931C, 484; State v. Baker, 164 Wash. 483, 2 Pac. (2d) 1099, P. U. R. 1931E, 482; Addy v. Fruitdale-on-the Sound Water Co., 164 Wash. 713, 3 Pac. (2d) 541, P. U. R. 1932A, 71.

West Virginia. United Fuel Gas Co. v. Public Service Comm., 73 W. Va. 571, 80 S. E. 931; Huntington v. Public Service Comm., 89 W. Va. 703, 110 S. E. 192, P. U. R. 1922C, 558; Bluefield v. Public Service Comm., 91 W. Va. 442, 113 S. E. 745, P. U. R. 1923A, 678; Royal Glen Land &c. Co. v. Public Service Comm., 91 W. Va. 446, 113 S. E. 749, P. U. R. 1924A, 560; Bluefield v. Public Service Comm., 94 W. Va. 334, 118 S. E. 542, P. U. R. 1924A, 158; Charleston v. Public Service Comm., 95 W. Va. 91, 120 S. E. 398, P. U. R. 1924B, 601; Natural Gas Co. v. Public Service Comm., 95 W. Va. 557, 121 S. E. 716, P. U. R. 1924D, 346; Pittsburg &c. Gas Co. v. Public Service Comm., 101 W. Va. 63, 132 S. E. 497, P. U. R. 1926D, 280; Huntington v. Public Service Comm., 101 W. Va. 378, 133 S. E. 144, P. U. R. 1926D, 835; Blue Field Tel. Co. v. Public Service Comm., 102 W. Va. 296, 135 S. E. 833; Elkins v. Public Service Comm., 102 W. Va. 450, 135 S. E. 397, P. U. R. 1927B, 270; United Fuel Gas Co. v. Public Service Comm., 103 W. Va. 306, 138 S. E. 388, P. U. R. 1927C, 441; Harrisville v. Public Service Comm., 103 W. Va. 526, 138 S. E. 99, P. U. R. 1927E, 11; Huntington Dev. &c. Co. v. Public Service Comm., 105 W. Va. 629, 143 S. E.

§ 933. **Federal courts on commission control.**—The federal court, in the case of *Des Moines Gas Co. v. Des Moines, Iowa*, 199 Fed. 204, frankly recognized the necessity and practical advantage of this method of regulation and control by conceding that: "Much of this kind of litigation, and practically all of the expense, would be avoided if Iowa, like so many of the other, including some neighboring, states, had an impartial and city nonresident commission or tribunal, with power to fix these rates at a public hearing, all interested parties present, with the tribunal selecting its own engineers, auditors, and accountants."

Where the rate is clearly confiscatory, because of its amount, or because the rate base was not properly determined, a federal question is involved on which the public utility may appeal to the federal court directly from the order of the commission; and this court will consider all phases of the question involved, including matters of business policy, collateral contracts for service and supplies, valuations, and depreciation, in determining the reasonableness of the rate fixed by the commission. This principle was clearly stated and fully discussed by the court as follows in the case of *Pacific Tel. & T. Co. v. Whitcomb*, 12 Fed. (2d) 279, P. U. R. 1926D, 815 (affirmed in 276 U. S. 97, 72 L. ed. 483, 48 Sup. Ct. 223): "A careful study of the cases, however, leads unerringly to the conclusion that one of the most important factors, if not the dominant factor, in determining the true basis of rate mak-

357, P. U. R. 1929A, 168; *Charleston v. Public Service Comm.*, 110 W. Va. 245, 159 S. E. 38, P. U. R. 1931E, 74; *Hodges v. Public Service Comm.*, 110 W. Va. 649, 159 S. E. 834, P. U. R. 1931E, 230; *State v. State Road Comm. (W. Va.)*, 131 S. E. 7.

Wisconsin. State v. Railroad Commission, 140 Wis. 145, 121 N. W. 919; *Waukesha Gas & Co. v. Railroad Commission*, 181 Wis. 281, 194 N. W. 846, P. U. R. 1923E, 634; *Wisconsin-Minnesota Light & Co. v. Railroad Commission*, 183 Wis. 104, 197 N. W. 363; *Madison R. Co. v. Railroad Commission*, 184 Wis. 164, 198 N. W. 278, P. U. R. 1924D, 379; *Milton v. Railroad Commission*, 185 Wis. 294, 201 N. W. 381; *Waukesha Gas & Co. v. Railroad Commission*, 191 Wis. 565, 211 N. W. 760, P. U. R. 1927B, 545; *Central Steam Heat & Co. v. Railroad Commission*, 192 Wis. 595, 213 N. W. 298, P. U. R. 1927D, 249; J.

Greensbaum Tanning Co. v. Railroad Commission, 194 Wis. 634, 217 N. W. 282; *State v. Railroad Commission*, 196 Wis. 410, 220 N. W. 390; *Wisconsin Gas & Co. v. Railroad Commission*, 198 Wis. 13, 222 N. W. 783; *Allen v. Railroad Commission*, 202 Wis. 223, 231 N. W. 184; *Wisconsin-Minnesota Light & Co. v. Railroad Commission*, 183 Wis. 96, 197 N. W. 359, P. U. R. 1924C, 534; *Union Coop. Tel. Co. v. Public Service Comm. (Wis.)*, 239 N. W. 409, P. U. R. 1932B, 269; *Milwaukee v. Railroad Commission (Wis.)*, 240 N. W. 165, P. U. R. 1932B, 339; *Wisconsin Tel. Co. v. Public Service Comm. (Wis.)*, 240 N. W. 411, P. U. R. 1932B, 195; *Wisconsin Hydro-Elec. Co. v. Railroad Commission (Wis.)*, 243 N. W. 322.

Wyoming. Weaver v. Public Service Comm., 40 Wyo. 462, 278 Pac. 542, P. U. R. 1929D, 625.

ing for public utilities is the cost of reproduction new less depreciation of the property of the utility devoted to the public convenience, at the time of making the rates, provided such cost fairly reflects normal and stable prices prevailing at the time, and which will with reasonable certainty continue to prevail throughout the period covered by the rates fixed, so far as reasonable human foresight, measuring the future by the present and the past, can determine. This is what the utility is supplying for the public service, and it is this of which it would be unjustly deprived by confiscatory rates, fares, tolls, or charges. There is practically no controversy concerning the original cost of the properties of the two companies. * * * In other words, it was held that accrued depreciation is to be ascertained by an inspection of the property—by going and looking at it and making estimates based upon the facts which such examination discloses. * * * It seems plain from the record, and the special master so found, that the three and one-half per cent per annum of the depreciable property of the companies fixed by the department was not sufficient to take care of the actual depreciation which was bound to occur, and was intentionally fixed at a lesser amount for the purpose of reducing what it conceived to be an excessive depreciation reserve fund. Such a method finds little support in law or reason. The depreciation to be taken into account in ascertaining the rate base is that diminution in the value of the property involved which takes place in the physical thing, and is ascertained by a physical inspection of it—not the future depreciation which inevitably comes about by wear, tear, obsolescence, and the like. * * * The amount of average working capital of both companies was stipulated by the parties, and was properly taken into account by the special master under the authorities already cited. In the hearing before the special master, it was not disputed that, in a case presenting proper proof thereof, 'going value,' 'going concern value,' or 'value of plant in successful operation (which are synonymous terms)' should be taken into account. * * * He studiously avoided making any allowance for development cost, and likewise repudiated the theory of capitalization of the net balance of alleged past deficits. He rightly held that this item of value rested largely in competent or expert opinion, and accepted in the case of the Pacific Company the amount testified to by the defendants' expert, Mr. Green. Under the authorities there can be little doubt as to the correctness of his action in this respect. * * * We pass now to a consideration of the licensee or socalled four and one-half

per cent contracts. These are contracts whereby the Pacific Company and the Home Company pay to the American Telephone & Telegraph Company four and one-half per cent of the gross revenues of the companies, respectively, for which the American Company supplies to the Pacific Company and the Home Company certain instrumentalities, appliances, patents, and services, not necessary to detail. * * * An examination of the foregoing cases leaves no doubt as to the validity of these contracts, and that the amounts paid under them are properly chargeable to operating expenses. * * * It is obvious therefore that an appeal to the state courts by the companies would have been an idle and useless formality. Moreover, the plaintiffs here are seeking relief against the orders of the department upon the ground that such orders are confiscatory, and therefore in violation of the federal Constitution. In such a case it is clear that the federal tribunals are not bound by the action of the state department, but it is their imperative duty to exercise an independent judgment on both law and facts. It has been pointedly so held in a number of cases. * * * Nor can it be doubted that under the statutes of the state of Washington the department has the power to abrogate and cancel such franchise rates if in a proper case it sees fit to do so. * * * The department, in its Pacific Company order of March 31, 1923, expressly found 'the installation of machine switches in Seattle is justified.' There is no evidence in the record which would warrant a contrary conclusion. Seattle is a progressive and rapidly growing city. Utilities which are equal to its present requirements may be grossly inadequate in the reasonably near future. Public service companies can not wait until their facilities break down or prove unequal to the demands upon them before making needful additions and improvements. Business judgment must be employed to anticipate reasonable future needs and to make provision for them in advance. This is essentially a matter of business management which may not be arbitrarily interfered with. There is nothing in the outlay to suggest dishonest, wasteful, or imprudent expenditure. The right of a public utility corporation honestly and in good faith to carry on its business and direct its affairs must not be wrested from it under the guise of rate making."

Where a decision on appeal from the commission has been finally rendered by the Supreme Court of the state, sustaining an order of the commission finding a party guilty of contempt, the question will be regarded as finally adjudicated, and an appeal to the federal court will not be sustained, unless there is a federal

question directly involved, as was indicated in the case of *Adams v. Decoto*, 21 Fed. (2d) 221, P. U. R. 1927E, 714, where the court said: "It appears from the record that the railroad commission, under and in pursuance of the provisions of the Public Utilities Act of the state, in proceedings duly taken for the purpose, found and decided, after due notice and hearing, that Adams in the operation of his public utility water system had violated one of the rules governing the system, in that he charged and received from various of the users thereof (89 in number) fifteen dollars each for connecting their pipes therewith, and thereupon made and entered an order that such sums so illegally charged and collected be forthwith returned by him. Adams, denying the validity of such order, petitioned the commission for a rehearing of the matter, which petition being denied, he applied to the Supreme Court of the state of California for a review of and the vacation of the order of the commission, which application the court denied February 28, 1927. * * * We therefore think that the case as presented to us stands *res judicata*, and it is not for this or any other federal court to anticipate what punishment the state railroad commission will impose for the contempt of its order committed by the plaintiff, Adams. On the contrary, the presumption clearly is that whatever punishment is so imposed will be in accordance with the provisions both of the laws and of the constitution of the state of California."

Where, however, the appeal is taken directly to the federal court on the question of rates, which are attacked as being confiscatory and in violation of the federal Constitution, this court will assume jurisdiction and determine the question *de novo*, especially where there is no statutory provision expressly providing for an appeal to the state court. This principle was enunciated and discussed at length as follows in the case of *Central Kentucky Natural Gas Co. v. Railroad Comm. of Kentucky*, 37 Fed. (2d) 938, P. U. R. 1930B, 225, where the court said: "Lexington, under the law of Kentucky, is a city of the second class. Charters of cities of the second class confer upon such cities no power to regulate the rates to be charged by public utilities furnishing service to their inhabitants. Chapter 61 of the Acts of the General Assembly of 1920 (now sections 201e-1 to 201e-26, Kentucky Statutes, Carroll's 1922 edition), confers that power upon the railroad commission of Kentucky. * * * Measured by the rule laid down and recognized in the foregoing, as well as in numerous other cases, the bill in this case is undoubtedly sufficient to invoke the jurisdiction of this court as a federal court."

* * * Neither sections 201e-1 to 201e-26 of Kentucky Statutes, under which the railroad commission finds its authority for regulating the rates of the plaintiff, nor any other statute of Kentucky, provide for an appeal to the courts of the state by a utility company dissatisfied with the rates fixed by the commission. The statutes of the state do not specifically provide for a proceeding in equity, in which the rates thus fixed may be attacked as being confiscatory, but that such right exists was recognized by the court of appeals of Kentucky in the case of Louisville & Nashville Railroad Co. v. Greenbrier Distillery Co., 170 Ky. 775, 187 S. W. 296. On the other hand, the statute under which the commission proceeded to fix plaintiff's rates does not attempt to deny the right of a utility company, in an appropriate proceeding, to have a court of competent jurisdiction try out the question of confiscation and exercise its own independent judgment as to the law and facts. Therefore the statute under which the railroad commission proceeded does not of itself deny due process of law. * * * In either jurisdiction exactly the same question would be involved, viz. Is the rate so low as to be confiscatory, thereby resulting in depriving the plaintiff of his property without due process of law? If the complaining party pursues the state remedy, and the state court, under the state law, is authorized to and does exercise its independent judgment on both the law and facts as to the question of confiscation and decides against the plaintiff, that is the end of the matter, and the case is res judicata, unless on error to the Supreme Court it should be determined that the state court acted arbitrarily or proceeded upon some fundamental error of law. But, as the question involved is a federal one, the plaintiff could have pursued his remedy in the first instance in the federal court. The state court procedure provided by the state law is simply an alternative elective remedy. * * * None of these cases is authority in support of defendants' contention that, when the state law permits a judicial review of a rate fixed by a rate-making body, that fact, as a matter of law, is such due process as to deny a federal court the power to hear and determine the question of confiscation in a suit brought in such court upon completion of the rate-making act. * * * Such a suit would present solely a controversy arising under the Constitution of the United States, of which district courts are given jurisdiction under section 24 of the Judicial Code (28 USCA, section 41). * * * In view of the conclusions herein announced, it becomes our duty to hear and determine de novo the questions of fact

and law as to whether or not the rate complained of is confiscatory. In such a hearing we are not confined to the testimony heard before the commission, as we probably would be had the commission's order been attacked solely on the ground that it was arbitrary and capricious. Of course, we are not to be understood as holding that the parties may not, by agreement, try the case before us upon the same evidence heard by the commission."

Where the question is one of confiscatory rates involving a violation of the federal Constitution, the federal court will determine the matter entirely on this question, as was indicated in the case of *Ottinger v. Consolidated Gas Co.*, 272 U. S. 576, 71 L. ed. 420, 47 Sup. Ct. 198, P. U. R. 1927A, 37: "He concluded that the prescribed rate of one dollar per thousand feet would not yield a return of six per cent, and was therefore confiscatory. With this conclusion the court below agreed, and we find nothing whatever suggested by the attorney-general in brief or oral argument which would justify material modification or reversal of the final decree in so far as it so adjudges and directs appropriate injunctions. As the statute is clearly confiscatory and therefore invalid under the Fourteenth Amendment, it was unnecessary for the trial court to consider other objections thereto, and we have not done so."

While a private carrier can not be converted into a common carrier by legislative action, because this would be taking property or subjecting its use to conditions or regulations in violation of the federal Constitution, the operation of towboats for the public use over the waters of the state constitutes them common carriers and subjects them to proper regulation by the state, so that they may not resort to the federal courts for relief on the ground that they are not common carriers. This principle was stated and discussed as follows in the case of *State of Washington v. Kuykendall*, 275 U. S. 207, 72 L. ed. 241, 48 Sup. Ct. 41: "The statutes of Washington declare that towboats operated 'for the public use in the conveyance of persons or property for hire over and upon the waters within this state' are common carriers. They require that charges made by common carriers 'shall be just, fair, reasonable and sufficient'; that the carriers file with the department of public works schedules showing the rates to be charged. * * * It is established that, consistently with the due process clause of the Fourteenth Amendment, a private carrier can not be converted into a common carrier by mere legislative command. * * * It can not reasonably be said that operators of towboats may not become common carriers

in the towing of logs in Puget Sound and adjacent waters. The manufacture of lumber at mills located by these waters is one of the principal industries of the state. The forests are tributary to the sound and waters connecting with it. Large quantities of logs are floated from the forests to the mills. Towboats are commonly used for that purpose. In all essential particulars that service is like the carriage of freight in vessels. The reasons for rate regulation are the same in one case as in the other. Within settled principles, one who undertakes for hire to transport from place to place the property of others who may choose to employ him is a common carrier."

§ 934. **Favorable attitude of courts of New York.**—The courts of New York, concurring with those of many other jurisdictions, expressed unqualified approval of the plan of commission control in the case of *Saratoga Springs v. Saratoga Gas &c. Co.*, 190 N. Y. 562, 83 N. E. 693, 18 L. R. A. (N. S.) 713, in saying: "That the most appropriate method (speaking from a practical, not necessarily constitutional, point of view) is the creation of a commission or body of experts to determine the particular rates, has been said several times in the opinions rendered by the Supreme Court of the United States in the various railroad commission cases and in those of state courts."

§ 935. **Commission control popular.**—And in the case of *People v. Willcox*, 207 N. Y. 86, 100 N. E. 705, 45 L. R. A. (N. S.) 629, this same court said: "That law [i. e., public service commissions law] was enacted in response to a pronounced and insistent public opinion, and was a radical and important modification of the relations and policy of the people toward the corporations, which are its subjects. Its paramount purpose was to protect and enforce the rights of the public. It made the commissions the guardians of the public by enabling them to prevent the issue of stock and bonds for other than statutory purposes, or in appreciable and unfair excess of the value of the assets securing them, and to prevent, also, unneeded or extortionate competition, or indifferent and unaccommodating methods of operation, or oppressive or discriminating charge or rates. It provided for a regulation and control which were intended to prevent, on the one hand, the evils of an unrestricted right of competition, and, on the other hand, the abuses of monopoly. * * * The certificate of public convenience and necessity is to be granted upon considerations, not alone bearing upon the convenience of the public, but affecting the other transportation companies,

which are already serving the territory. They have the right to be considered and to be protected, where there is no necessity for a wider public service, against the designs of persons more interested in forcing terms from them than in subserving the public convenience. Certainly the rights of shareholders in the existing roads demand fair consideration.' * * * It is the settled policy of the state, arising through an extended and instructive experience, to withdraw the unrestricted right of competition between corporations occupying, through special consents or franchises, the public streets and places, and supplying the public with their products or utilities which are well-nigh necessities. * * * This policy is instigated and embodied in the Public Service Commissions Law, which was adopted in the interests and for the good of the people, and should receive from the courts an activity and effect in aid of that policy within the fair and reasonable meaning of its provisions."

§ 936. *Attitude of Wisconsin court.*—The Supreme Court of Wisconsin has also fully sustained and very frankly approved the plan of commission control in the case of *Calumet Service Co. v. Chilton*, 148 Wis. 334, 135 N. W. 131, where the court said: "Control by the trained impartial state commission, so as to effect the one supreme purpose, i. e., 'the best service practicable at reasonable cost to consumers in all cases and as near a uniform rate for service as varying circumstances and conditions would permit,—(is) a condition as near the ideal probably as could be attained.'"

Where the commission fails to discharge its duty of determining the amount of indebtedness which may be properly issued on the assets of a public utility, the court will remand the case for a determination of the matter by the commission, according to the provisions of the statute, and reverse the decision of the lower court in its attempt to make this finding for the commission, for as the court said in the case of *Central Steam Heat & Power Co. v. Railroad Commission*, 192 Wis. 595, 213 N. W. 298, P. U. R. 1927D, 249: "The statute places upon the commission the duty to ascertain the amount of indebtedness that may reasonably be issued against the assets of the public utility. The commission did not meet that duty in the present case. * * * There is no power in the circuit court to direct the commission to find that a certain amount is reasonably necessary, where the commission has not acted upon that subject at all. Findings that too much is asked, that the project could not be financially successful, or that the securities would not be a safe investment, are findings out-

side the statutory field and do not answer the plain calls of the statute. * * * The statute does provide for security, because there must be a finding by the commission that the amount of securities to be issued is reasonably necessary for the purposes for which they are to be issued. In the absence of such a finding the statutory security would be wanting. Whether such security is in all cases adequate may be doubted, but we need go no further than did the legislature. It stopped when it had provided for a finding that a certain amount of indebtedness may reasonably be issued against the assets of the utility. The judgment of the circuit court is reversed and the cause is remanded, with directions to the circuit court to remand the case to the commission to find and determine the amount of common stock, of preferred stock, and of bonds reasonably necessary for the purposes for which they are to be issued, and having made such finding, to issue a certificate of authority accordingly and in conformity with the statute."

This court in a later case indicated that a purchase of property by a public utility can only be made at a sum fixed by the commission after a valuation of the property and a determination by the commission of the probable earnings of the property, which can only be ascertained by fixing the rate base, after excluding contributions advanced by its customers until they are incorporated in its normal field, in order to insure a reasonable protection to the purchasers of the securities. In determining this fact and in providing a reasonable protection for such purchasers, the public utility is limited to the amount fixed by the commission. This principle was announced and discussed as follows in the case of *Wisconsin Hydro-Electric Co. v. Railroad Commission* (Wis.), 243 N. W. 322: "So far as the record discloses, defendant refused to permit the issuance of securities upon a basis which included assets acquired by customers' donations simply because the rate schedule of the plaintiff's predecessor did not permit such predecessor to earn a return upon the amount of such donations. Clearly, in determining the amount of securities that may be issued upon a public utility property, the question of the return which the utility may be permitted to earn upon its property can not be ignored. That is one of the elements which section 184.09, Stats. (1929), contemplates shall be taken into consideration by the commission in determining the amount of securities that the utility company may be permitted to issue upon its property. Under the public policy of this state, as evidenced by its legislative enactments and recognized by this court in State

ex rel. Central S. H. & P. Co. v. Gettle, 196 Wis. 1, 220 N. W. 201, the authority of a public utility to issue stocks and bonds is a mere privilege which is subject to such legislative regulations as are prescribed in section 184.09, Stats. Rightly, the legislature has not confined the factual basis, which the commission is to ascertain and consider in determining the amount of the security issues, to merely the value of the assets to which the corporation technically has title. * * * Manifestly, reasonable protection to prospective purchasers is to constitute an important consideration. It seems that in the development of similar utilities prospective customers who desired utility service, but who resided beyond the normal zone supplied by the utility, would, in order to secure service, contribute substantial amounts to the utility to defray the expense of extending the service to such customers. Such donations enabled the utility, as in the case at bar, to build the necessary lines and supply the necessary equipment to enable it to furnish to the donating customers the same service which it was furnishing to the public within the normal zone served by the utility. As long as that situation exists, it is apparent that the rates, which the utility is permitted to charge, should be influenced to some extent, at least, by the fact that the investment necessary to extend such extraterritorial service has been donated by those receiving the service. The extent of such influence, in point of amount and duration, will depend upon the facts and circumstances in each case. When the donors, by their own contributions, put themselves upon a par, so far as the expense of extending the service was concerned, with those having a right to demand the service of the utility within its normal zone, they should not also be charged a rate which would yield to the utility a return upon the amount of their own donations. True, the title to the property resulting from these contributions vests in the utility, and the utility should be permitted to charge a rate sufficient to cover depreciation of the property and to compensate it for rendering the service. But upon no theory could it be permitted to charge a rate which would yield to it a return upon the investment made by the donating customers to place themselves in a position or relation where the utility could afford to extend its service to them. * * * Their original contributions were for a special purpose, namely, the receipt of service up to the time that the utility should occupy the field and assume a position where it became legally bound to furnish service generally at a uniform schedule of rates to all consumers in that zone. With the termination of that special right on the part of

the donors, the utility's title to the property thus donated is no longer burdened with any such correlative rights or conditions. The utility as the owner thereof is then entitled to earn the same reasonable return upon the present fair value thereof, as it is upon all other property owned by it, which is actually used and useful in providing the service."

The attitude of our courts in sustaining the powers of commissions and in upholding their wide discretion in granting or refusing certificates of convenience and necessity, where the question of competition is involved, was well expressed in the case of *Union Cooperative Tel. Co. v. Public Service Comm. (Wis.)*, 239 N. W. 409, P. U. R. 1932B, 269, where the court spoke as follows: "A franchise to operate a public utility is a legislative privilege. It may be granted or withheld at the pleasure of the legislature, and, where the legislature acts directly upon the subject, no justiciable question results. The legislature can not be coerced to grant the privilege no matter what its reasons for withholding the same, and no matter whether the public convenience would be promoted by granting the privilege. The power of granting a certificate of convenience and necessity which the legislature has delegated to the public service commission by section 196.50, Stats., is legislative in character. The power delegated or conferred is broad. * * * In this case there appears to be no reason for disturbing the order or determination of the commission withholding the certificate of convenience and necessity. * * * We think this consideration fully justified the former railroad commission in its denial of the certificate. The legislative scheme is to give a public utility a monopoly in its territory, and to secure adequate service at reasonable rates through the regulatory powers conferred upon the commission. While it is within the power of the commission to grant a certificate of convenience and necessity which will open the way for a competitor in the field, it is not unreasonable for the commission to withhold a certificate where the patrons of the utility have taken no steps to coerce such service through the agency which the legislature has established for that purpose."

§ 937. Right of appeal construed.—This uniformly favorable attitude of our courts towards the principle of commission control is pertinent and deserves consideration in connection with their holding that the right of appeal and judicial review is statutory and therefore subject to the will of the legislature within the constitutional limitations of due process and equal protection of the law with respect to the preservation of property and contract

rights. The nature and extent of the right to appeal from the commission's action, together with the reason for the rule, are well expressed in the case of *Minneapolis, &c. R. Co. v. Railroad &c. Comrs.*, 44 Minn. 336, 46 N. W. 559, where the court said: "Being purely the creature of statute, the right of appeal from the decision of the commission to the district court, if it exists, must be found in express provisions of the act. * * * But it is not to be presumed that the legislature intended to turn the courts into appellate railroad commissions, which should retry the facts, and pass upon matters of a purely administrative nature, relating to the maintenance and operation of railways, involving merely questions of policy affecting the security or convenience of the public. Indeed, if the act assumed to confer upon the courts jurisdiction over matters so entirely foreign to the judicial functions, it would be of doubtful validity to say the least of it."

A public utility will not be permitted to buy out a competitor for more than its property is worth and add the entire amount to the used and useful property on which a rate base is calculated. In such a case the order of the commission will be sustained because no constitutional right of the company had been violated, and the order was reasonable on the question of valuation. This principle was announced and discussed as follows in the case of *Consumers Co. v. Public Utilities Comm.*, 41 Idaho 498, 239 Pac. 730, where the court said: "Of the matters determined by the utilities commission, this court will consider only those with respect to which a rehearing was asked. * * * Therefore we can not say that the commission erred in refusing to add the item of \$9,841.03 to the value of the system, for it surely can not be seriously contended that a utility can buy out a competitor or a predecessor, pay therefor more than the value of that which it receives, and then add to the value of its property, used and useful, on which a return must be paid, the difference between the worth of what it bought and what was paid. * * * Because of the condition of this water system, as found by the commission, it being a well-managed, successful, and profitable concern, it has a going-concern value (*Boise Artesian Water Co. v. Public Utilities Commission*, 40 Idaho 690, 236 Pac. 525), which must be included in the total on which it is entitled to a return. * * * The commission is the judge of the facts and of the weight of the evidence. The statute has restricted the province of this court, in an appeal from an order of the commission, to a determination of whether the commission has regu-

larly pursued its authority, and whether the order in question violates any constitutional right of the appellant. It appears from the record before us that the commission heard and determined all the evidence produced on the subject of going concern value, and that it did not err in refusing to make the allowances contended for by appellant; that it made allowances for overheads, and that in determining the fair value of the property of the utility the commission had in mind the fact that the utility is a successful and profitable concern, and so valued it. It is our conclusion that the commission regularly pursued its authority, and that no constitutional right of the company has been violated."

The party desiring to take an appeal must file a motion with the local court praying an appeal; and unless this is done, the appeal will be dismissed, for as the court said in the case of *Arkansas Railroad Comm. v. Galutza*, 176 Ark. 481, 2 S. W. (2d) 1092: "The Messina Bus Line was granted a license certificate on May 31, 1927, authorizing it to operate a bus line on certain highways in the state of Arkansas, particularly from Helena to Ferguson, in Phillips County. On June 15, 1927, the railroad commission granted a permit to operate a taxi service to Joe Galutza, G. Centenio, and Mike Messina, and the permit for taxi service. * * * The railroad commission gave notice and granted a hearing, and, after hearing the testimony, the commission found that the defendants had violated the terms of their permits, and made an order canceling the permit to the defendants. An appeal was taken to the Pulaski circuit court, where a trial was had, and the circuit court found that the order of the railroad commission was unreasonable and should be set aside, and made an order setting it aside. The Arkansas railroad commission filed its transcript in court, and prayed an appeal, which was granted by the clerk of this court on November 14, 1927. The Arkansas railroad commission did not file any motion for a new trial in the circuit court. * * * It will be observed from the reading of this act that the party aggrieved or the party desiring to take an appeal takes the appeal by filing a motion in writing in the circuit court or in the office of the clerk of the circuit court, praying an appeal. It is necessary that this motion in writing be filed. This was not done by the appellant in this case. It therefore appears that the appellant did not take an appeal in the manner provided by law by filing his motion in writing in the circuit court or with the circuit clerk, and the appeal is therefore dismissed."

A statute attempting to confer legislative duties, which properly belong to the public service commission, on the executive of the state or the courts, by requiring the court to try such legislative matters de novo, will be set aside as unconstitutional as it constitutes a direct violation of the constitutional provision providing for the tripartite division of governmental powers, as was indicated in the case of *Hodges v. Public Service Comm.*, 110 W. Va. 649, 159 S. E. 834, P. U. R. 1931E, 230, where the court said: "The local investigation and subsequent determination by the commission of the effect of a proposed development from 'the standpoint of the state as a whole and the people thereof' (as required by the act) are clearly legislative in character. *Royal Glen Land & Lumber Co. v. Public Service Commission* (1922) 91 W. Va. 446, 113 S. E. 749. * * * Upon the appeal, it is apparent that the legislature intended the circuit court to try and determine these legislative matters de novo, without regard to the findings of the commission. Such a proceeding would plainly traverse both mandates of article 5. * * * For like reasons, the act also violates both the spirit and letter of the constitution, in imposing purely legislative duties on an executive, the governor. * * * After one hundred years of observation, the Supreme Court of the United States extolled the tripartite division of governmental powers as 'one of the chief merits' of the American system of written constitutions and said that it was essential to the successful working of the system 'that the persons entrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other.' *Kilbourn v. Thompson* (1881), 103 U. S. 168, 191, 26 L. ed. 377. Loyalty to this system, under our oaths of office which exact support of the constitution, compels us to declare unconstitutional the act in its entirety."

Until a certificate of convenience and necessity has been requested, the court will not assume that it will be denied, nor will it grant relief by way of injunction until this has been done, for as the court said in the case of *Clark v. Poor*, 20 Fed. (2d) 182⁸⁶: "Upon plaintiffs' admission that they are common carriers for hire between fixed termini and otherwise, within the definition of the Motor Transportation Act, it is plain that they are obliged to comply with all the provisions of this law, not unconstitutional,

⁸⁶ Affirmed in 274 U. S. 554, 71 L. ed. 1199, 47 Sup. Ct. 702.

as applied to them. If defendants have been and are willing to grant the certificate, and are not seeking to enforce any system of uniform accounting against the plaintiffs, and if there are no specific police regulations in the law or orders of the commission complained of, then plaintiffs are without equity, except in so far as the conditions annexed to defendants' offer may be unconstitutional. * * * The final order of the court in the Liberty Highway Company case, 294 Fed. 703, was that, until the party complaining had offered to comply with the provisions of the law sustained by the court, it was not entitled to an injunction, even as against the provisions held to be invalid. In the present case, no application having been filed for a certificate of convenience and public necessity, and no offer made to comply with any of the provisions of the law, this court can not now assume that defendants would refuse such a certificate with requirements limited in accordance with the views expressed herein and in opinion in the Red Ball Transit Co. case, 8 Fed. (2d) 635. Plaintiffs are therefore without equity."

§ 938. Power of commissions to issue final orders defined.—There being no inherent right of appeal, the nature and extent of the power and authority of such commissions to issue orders, from which there is actually no appeal, are concisely stated in the case of *Interstate Commerce Comm. v. Union Pacific R. Co.*, 222 U. S. 541, 56 L. ed. 308, 32 Sup. Ct. 108, as follows: "The orders of the commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so than an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. * * * "The findings of the commission are made by law *prima facie* true and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience." * * * Its conclusion of course is subject to review, but, when supported by evidence, is accepted as final."

On an application for a certificate of convenience and necessity, the commission can not require the public utility to agree in advance on the amount of the rate base and to pay certain fixed charges to the state and to agree that the state may reserve the right of recapture, because this would deprive the company of the right to a hearing on these questions; and such an order by the commission will be set aside as unreasonable, and the matter referred back to the commission for consideration by it without an exaction of the conditions it attempted to impose as conditions precedent to the filing of the petition. This principle was stated and discussed as follows in the case of *Tennessee Eastern Electric Co. v. Hannah*, 157 Tenn. 582, 12 S. W. (2d) 372, P. U. R. 1929B, 218, where the court said: "Can the commission legally say, at the time of the application for a certificate of convenience and necessity, that water power value, as separate and distinct from the value of the lands and structures thereon, shall not be embraced within the rate base? In other words, that 'water power value,' as separate and distinct from the value of the land itself, shall not be embraced within the rate base. Can the commission legally say that the applicant for a certificate shall pay to the state of Tennessee not less than one mill per K. W. H. of electricity generated by the hydroelectric development for which he secured a certificate? Can the commission say that the state reserves the right of recapture at the expiration of fifty years on the terms set out in the certificate of convenience and necessity? It will be borne in mind that these rules require, as a condition precedent to the consideration by the commission of an application for a certificate of necessity and convenience, that the applicant agree in advance, (c) to the fixing of a basis for future determination of values and rates involving valuable rights; (f) to the payment of a certain fixed charge; and (h) to such rights of recapture after fifty years by the state as the certificate when issued may prescribe. By this requirement of an advance or preliminary agreement by the applicant against its interest, and waiving or conceding its valuable rights, the applicant was deprived of all opportunity for a hearing before the commission, or otherwise, or elsewhere, of its day in that or any other court. The right of a water and electric light, heat, and water power company to do business in Tennessee and in the towns and counties thereof—its privilege or franchise—does not come from the railroad and public utilities commission. * * * Nevertheless, by section 7, Acts 1919, ch. 49, *supra*, the commission is given power, after hearing, to approve a privilege or franchise, if the

commission determines such privilege or franchise is necessary and proper for the public convenience and properly conserves the public interest. It would seem that the implied power to withhold its approval of the privilege or franchise until the public interest is properly conserved authorizes the commission indirectly to impose upon the public utility conditions of the tendency of rules (c), (f), and (h). Just what conditions the commission may impose, directly or indirectly, upon the exercise of such a privilege or franchise, we are not called upon to declare in this case. Section 7 provides for a hearing before a privilege or franchise may be approved or disapproved, and we are satisfied the commission is without power to exact, in advance of a hearing, such obligations as are contained in rules (c), (f), and (h). The chancellor was of opinion that all three of these rules were unreasonable and unenforceable, for reasons ably set forth by him. Whatever may be said as to the merits of the questions arising thereunder, and the rights of the state and powers of the commission, it seems clear to us that it is unreasonable to require that an applicant, shall in advance and without a hearing commit itself irretrievably with regard thereto. We deem it sufficient for the present situation to adjudge with respect to the right of the commission to exact in advance agreements from the applicant touching these matters, leaving open for future disposition, first by the commission itself, and then by the courts, if review is sought, such issues as may arise. We are of the opinion, therefore, that the said rules and regulations should be so amended as to permit the filing of an application, and its consideration by the board without an exaction of the waiver agreements now provided for thereby."

In the absence of constitutional authority, a public utilities commission is denied the power to punish a public utility for contempt for not having obtained a certificate of convenience and necessity before operating as such, because the commission has no such power, which belongs exclusively to the courts. This principle was announced and discussed as follows in the case of *People v. Swena*, 88 Colo. 337, 296 Pac. 271, P. U. R. 1931C, 149: "The public utilities commission sued M. R. Swena to recover the amount of a fine imposed by it in a contempt proceeding. It is alleged in the complaint that the commission found that Swena was operating as a motor vehicle carrier without having obtained a certificate of public convenience and necessity, and ordered him to desist; that he violated such order and was adjudged by the commission to be in contempt. * * * The public utilities com-

mission is not a court. *Public Utilities Commission v. Colorado Title & Trust Co.*, 65 Colo. 472, 178 Pac. 6; *Clark v. Public Utilities Commission*, 78 Colo. 48, 239 Pac. 20. It is charged with the performance of certain executive and administrative duties. In the performance thereof, and as incidental thereto, it hears evidence, ascertains facts, and exercises judgment and discretion; but this is the exercise of merely a quasi-judicial function, not the exercise of judicial power within the meaning of the constitution. *Public Utilities Commission v. Colorado Title & Trust Co.*, supra. The power to punish for contempt is a judicial power within the meaning of the constitution. It belongs exclusively to the courts, except in cases where the constitution confers such power upon some other body. * * * The constitution of Oklahoma expressly confers upon the corporation commission the powers of courts of record, including the power to punish for contempt, Constitution, article 9, section 19. Our constitution confers no such power upon the public utilities commission. * * * In fining Swena for contempt, the commission acted without constitutional warrant."

A public utilities commission may bring an action in the courts against a public utility for operating contrary to law; and no proceedings before the commission are necessary before instituting the action in the courts, because the commission alone has the authority to establish routes and issue certificates to motor vehicles operating as common carriers over an established route on the state highways. This principle was enunciated and discussed as follows in the case of *Public Utilities Comm. v. Pulos*, 75 Utah 527, 286 Pac. 947, P. U. R. 1930E, 260, where the court said: "Thus, if the defendant at the time complained of was operating a public utility in his state contrary to law, the commission not only had the authority but it was its duty to bring a proceeding in the district court to enforce a compliance with the law. Nor is there any provision in the act which requires that any proceeding be had before the commission prior to the commencement of an action or proceeding before the district court. * * * It would seem reasonably clear that an established route must be a route that has a legal existence. One who merely uses the public highways for the transportation of freight for compensation can not be said to have established a route. The authority to create, designate, permanently fix or establish a route, as defined in the public utilities act is by that act lodged in the commission and not in those who choose to use the public highways for the transportation of freight for compensation. It

can not well be said that a route along a public highway can be established by acts which are prohibited by law, nor by the acts of private persons or corporations. A route has a legal existence only when established by authority of law. The public utilities commission, and it alone, is granted power to establish routes for public utilities."

§ 939. **Judgment of commissions on questions of reasonableness.**—This rule is well stated in the case of *People v. McCall*, 219 N. Y. 84, 113 N. E. 795, to the effect that: "The court has no power to substitute its own judgment of what is reasonable in place of the determination of the public service commission, and it can only annul the order of the commission for the violation of some rule of law. The public service commissions were created by the legislature to perform very important functions in the community, namely, to regulate the great public service corporations of the state in the conduct of their business, and compel those corporations adequately to discharge their duties to the public and not to exact therefor excessive charges. It was assumed, perhaps, by the legislature that the members of the public service commissions would acquire special knowledge of the matters entrusted to them by experience and study, and that when the plan of their creation was fully developed they would prove efficient instrumentalities for dealing with the complex problems presented by the activities of these great corporations. It was not intended that the courts should interfere with the commissions or review their determinations further than is necessary to keep them within the law and protect the constitutional rights of the corporations over which they were given control."

An order of the commerce commission, granting a certificate of convenience and necessity for additional service where there was no public interest demanding it, will be reversed by the courts, especially where there was no showing of the financial ability of the public utility proposing to render the additional service, and the company was acting for and was under the control of the company furnishing the existing service. This principle was announced and discussed as follows in the case of *Roy v. Illinois Commerce Comm.*, 322 Ill. 452, 153 N. E. 648: "This was a petition for another railroad company to construct a new railroad from one point to another on an existing railroad. It clearly appears that no public interest will be served by the construction and operation of the proposed railroad. * * * It will simply result in two railroads between two points, a mile and a quarter apart in these neighboring municipalities. That is the

only effect of this order. * * * It is not consistent with the purpose of the Public Utilities Act (Smith-Hurd, Rev. St. 1925, ch. 111 2/3) to bring under public control, for the common good, property applied to the public use in which the public has an interest; that a corporation nominally organized for independent service as a public utility, but having actually no other object than to act for and under the control of another, should be granted a certificate of public convenience and necessity for the operation of a public utility. * * * Therefore every corporation applying for a certificate of convenience and necessity must show both its intention and ability, financial and otherwise, to render the service which it asks for authority to undertake. The ability of the corporation to furnish adequate and satisfactory service is a question essential to be determined upon every application for a certificate of convenience and necessity. *Chicago Motor Bus Co. v. Chicago Stage Co.*, 287 Ill. 320, 122 N. E. 477; *Superior Motor Bus Co. v. Community Motor Bus Co.*, 320 Ill. 175, 150 N. E. 668. No evidence was introduced of the financial ability of the North Shore Connecting Railroad, and there was, therefore, no basis in the evidence for the order of the commission."

Where the convenience and necessity of the public justify the issuance of a certificate for public utility service, an order providing for such service will be sustained because it was in the public interest and the action of the commission was reasonable and within its authority, and accordingly it must be sustained by the court, as was indicated in the case of *Chicago, B. & Q. R. Co. v. Illinois Commerce Comm.*, 345 Ill. 576, 178 N. E. 157: "In reviewing the order of the commission this court is limited to a determination as to whether the commission acted within the scope of its authority, whether the order has substantial foundation in the evidence, and whether any substantial right has been infringed by the order. * * * It appears from the evidence in this case that the convenience and necessity of the public, as distinguished from the desire of a few individuals, will be served by the granting of the certificate. *Public Utilities Comm. v. Bethany Telephone Assn.*, 270 Ill. 183, 110 N. E. 334, Ann. Cas. 1917B, 495. The findings of the commission as to the need for the transportation along the route in question and the ability of appellee to perform the service have substantial foundation in the evidence and should not be disturbed by this court on the ground that the order and the evidence are not sufficient. * * * Five passenger trains operate daily each way between Rockford and Rochelle, furnishing adequate service between these two

points. It is the policy of this state that where a public utility is furnishing adequate service, a certificate of convenience and necessity will not be granted to a competing line. *Bartonville Bus Line v. Eagle Line*, 326 Ill. 200, 157 N. E. 175. The order of the commerce commission was in error in not excluding therefrom transportation of passengers traveling exclusively between Rockford and Rochelle."

As the court is limited to the performance of judicial functions, while those of the commission are legislative, a decision by the commission as to the reasonableness of a rate in the first instance was held not to be subject to review in *Seaberg v. Raton Public Service Co.* (N. Mex.), 8 Pac. (2d) 100: "The function of the commission is legislative; that of the court, judicial. The commission is not given power to enforce any order; it being merely a rate-making or rule-making body, doing what, if there were no commission, the legislature alone could do. The court, on the other hand, can make no rate or rule, since it lacks the legislative power. As regards the reasonableness of the rates, the commission, the only tribunal to which the public can resort to obtain reasonable rates, has spoken. It has said that the public has no just cause of complaint. This court can no more review that decision than if it had been made by the legislature. * * * This comes within the commission's decision that the rates are reasonable, and, for the reasons above stated, it is not reviewable. This we judge to have been the view of the commission. * * * We conclude that as the matter now stands we can not review the order or afford redress. The removal proceeding will therefore be dismissed and the matter and record remanded to the corporation commission, without prejudice to any further or other proceedings. It is so ordered."

The judgment of the commission on questions of reasonableness in determining whether the existing service is sufficient and in denying a certificate for additional service rests largely in the discretion of the commission, but is nevertheless subject to review by the courts, although the decision of the commission in the matter is presumptively reasonable and will not be set aside unless the evidence clearly fails to support it, for as the court said in the case of *State v. Ooten* (Iowa), 243 N. W. 329: "It is because of the paving improvement and the fact that transportation business will naturally concentrate upon it, that the law classifies the truck operator between fixed termini and over a regular route as being subject to taxation or license fees. In some such way must the cost of paving improvement and its maintenance

be equitably met. The fact that the defendant was a permit holder under chapter 252-C1 does not give him a permanent status as such. The very development of his business may result in imposing upon him the status created by chapter 252-A1, notwithstanding his original classification. We had this statute under consideration in the recent case of *State ex rel. v. Blecha & Owen Transfer (Iowa)*, 239 N. W. 125, *supra*. The material facts in that case were very like those that appear herein. We are unable to see a material distinction between them. We recognize the fact that the line of demarcation is close and difficult. We see nothing to be gained by a detailed discussion of the evidence. It can never be identical in any two cases. The period of operation by the defendant was short. A longer period might have developed the facts more definitely. The burden must be deemed to rest upon the plaintiff. Pursuant to our holding in the *Blecha & Owen Transfer* case, above-cited, we think the same result must be reached here. We do not thereby purport to adjudicate for defendant a permanent status."

As the burden of proof rests upon the petitioner in appealing from an order of the commission it will be sustained unless the burden of proof is met by the petitioner, for as the court said in the case of *State v. Public Service Comm. (Mo.)*, 49 S. W. (2d) 614: "The issuance by the public service commission of a certificate of convenience and necessity is a prerequisite to the establishment and operation of motor carrier service (sections 5264-5267, Rev. St. 1929), and 'the power to grant, or to refuse to grant, to a public utility a certificate of convenience and necessity is committed to the discretion of the public service commission, without defined limits, and not to the circuit court or to this court.' *State ex rel. Detroit-Chicago Motor Bus Co., Inc. v. Public Service Commission*, 324 Mo. 270, 23 S. W. (2d) 115, 116. Upon this review, the question is not whether the court, if the matter were before it, would make the same order made by the commission, but only whether the order as made by the commission is reasonable and lawful. Section 5234, Rev. St. 1929. To justify a reversal of an order of the commission falling within its discretionary power on the ground that such order is unreasonable, it must appear that the action of the commission was arbitrary or without reasonable basis, and the burden of showing that the commission's order refusing a certificate is unreasonable or unlawful is upon the applicant, the respondent in this case. Section 5247, Rev. St. 1929. * * * Applying the first and third considerations which are specifically enjoined upon the commis-

sion to the evidence in this case showing that adequate, sufficient, and convenient service for the transportation of passengers between St. Louis and Kansas City and between points on highway No. 40 was fully provided by the existing and established street car and railroad lines and certified motor carriers, and that such carriers were equipped and able, not only to efficiently meet the present demands and requirements and serve the convenience of the traveling public, but also to carry a much larger volume of passenger business than was then being carried over their lines, we can not hold with the circuit court that the order of the commission denying the applicant a certificate of public convenience and necessity is either unreasonable or unlawful. * * * Upon review of an order of the public service commission refusing a certificate of public convenience and necessity if the court finds the order of the commission to be neither unlawful nor unreasonable, it should affirm the order. *State ex rel. Mo. Pacific Railroad Co. v. Public Service Commission*, 327 Mo. 249, 37 S. W. (2d) 576, *supra*. Applying to the evidence in this case the controlling considerations imposed by statute, we do not find the order under review either unlawful or unreasonable."

In a later case this same court decided that while the orders of the commission are subject to judicial review the jurisdiction of the court is confined to a determination of the reasonableness and legality of the order, saying in *State v. Public Service Comm. (Mo.)*, 49 S. W. (2d) 619: "While all orders of the commission are subject to judicial review (section 5234, Rev. St. 1929), the court is confined upon review to a determination of whether, under the facts as found by it, such order is reasonable and lawful. If the reviewing court finds the order both reasonable and lawful, its duty is to affirm it. If the order be found to be 'either unreasonable or unlawful,' it should be set aside. * * * If no certified motor carrier were operating on this route, and the railroad company through its subsidiary and an independent motor carrier were each applying for a certificate, then the considerations urged by applicant would seem to require that, 'in accord with justice and sound business economy,' the railroad company, being the transportation utility already in the field, should 'be given an opportunity to furnish the required service.' *Egyptian Transportation System v. Louisville & N. R. Co.*, 321 Ill. 580, 152 N. E. 510, 513. * * * Under the facts, and in view of the statute defining the considerations which shall control the determination of whether a certificate shall be issued, we do not find the

order of the commission herein to be either unreasonable or unlawful."

The burden of proof is on the applicant to show that public convenience and necessity require the proposed additional service and, unless this fact appears from the evidence, the action of the commission in denying a certificate for such service will be sustained, for as this same court said in the still later case of *State v. Public Service Comm. (Mo.)*, 49 S. W. (2d) 622: "Applicant did not sufficiently show that public convenience and necessity required the establishment of the proposed additional motor carrier service between Odessa and Kansas City or that public convenience and necessity would be promoted thereby. * * * No evidence was offered or showing made of public necessity or that public convenience would be served by the establishment of a motor carrier service between Higginsville and Odessa apart from the proposed service between Odessa and Kansas City and intermediate points."

§ 940. **Court not to substitute its judgment for that of commission.**—In upholding the action of the commission and defining its authority and purpose, the court expressed this principle in the case of *United Fuel Gas Co. v. Public Service Comm.*, 73 W. Va. 571, 80 S. E. 931, as follows: "But we can not construe the statute as intended to give us the power and authority to substitute our judgment for that of the commission, in a matter purely legislative or administrative. Such a construction would practically emasculate the statute and rob it and the commission of their proper authority and jurisdiction. The salaries which the statute attaches to the office of the commissioners, and the nature of the subjects to be dealt with by them, all imply that only persons of the requisite qualifications should be appointed, and that after appointment they should by investigation and study become further qualified by learning and experience, indeed should become experts upon all subjects and business coming within their jurisdiction."

An order of the board of public utility commissioners requiring adequate service from a public utility whose only reason for not furnishing it was its financial inability to do so will be sustained by the courts where the evidence reasonably supports the order, for as the court said in the case of *Middlesex Water Co. v. Board of Public Utility Comrs. (N. J.)*, 140 Atl. 254, P. U. R. 1928C, 343: "We think that the construction to be put upon the two sections referred to in order to carry out the legislative intent, is that, where the evidence, taken under the Certiorari Act

merely controverts the testimony adduced before the public utility board, and upon which testimony the board based its order, this court will not undertake to weigh the testimony, but will seek to ascertain whether there was any testimony before the board which reasonably supports its order. If there is testimony reasonably supporting the board's order and there is no testimony adduced from which it is made to appear that the order was without the jurisdiction of the board, or that the testimony taken before the board does not reasonably support the order, this court will not interfere. We have therefore reached the conclusion that the application to strike out the testimony, taken in the proceedings on certiorari, should be denied. * * * It is rather an alarming proposition that a company, enjoying a franchise to furnish water to a municipality, in the performance of which task it must be considered that the lives, needs, health, and comfort of the inhabitants, and safety of property, are involved, because all, more or less, are dependent upon an adequate supply of water, with adequate service, can successfully entrench itself against a compliance with the order of the board on the plea that the company has not the financial ability to furnish equipment for an adequate supply of water with adequate service for distribution. Palpably such an excuse can not properly be permitted to prevail."

The decision of the commission will be sustained by the courts if supported by substantial evidence, especially where the commission granted a certificate for complete service by one public utility rather than a connected service by two, because it avoids transferring from one to another line of service; and the court will refuse to substitute its judgment on such a question for that of the commission, as was indicated in the case of *Auto Interurban Co. v. Department of Public Works*, 153 Wash. 479, 279 Pac. 738, where the court said: "Either of the applicants is capable of furnishing adequate service over the North Central Highway. However, there is not sufficient business for two operations. The applications are essentially the same. The operations proposed by the Washington Motor Coach Company would be more advantageous than those proposed by the Auto Interurban Company. * * * The department was of the opinion that it should grant to the Washington Motor Coach Company the permission to operate between Davenport and Spokane, with a limitation prohibiting the furnishing of any local service. Such limited operation would not take from the Auto Interurban Company any business that it is now receiving. Connected service by two independent

operators is always unsatisfactory to the public. The operators usually have divergent interests. The inconvenience of transferring one's self and one's baggage from one car to another is often sufficient to divert patronage to some other transportation system. * * * We have uniformly held that " * * * this court will not substitute its judgment for the judgment of the commission; that every presumption will be given to the correctness of the findings of fact made by the commission; and, if there is substantial evidence on which the findings of the commission may be based, that those findings will not be disturbed."

An order of the public service commission granting permission for additional service by another public utility, where the existing company failed and refused for many years to extend its service in a growing community desiring it, will be sustained by the courts, especially where the lower court found that the order was reasonable; for in such a case, the higher court will sustain it if there is any evidence to support it. This principle was enunciated and discussed as follows in the case of *Wichita Gas Co. v. Public Service Comm.*, 132 Kans. 459, 295 Pac. 668, P. U. R. 1931B, 442: "As the law now is, the record that the utility expects to rely upon before the court must be made at the hearing before the commission. The fact that the new procedure provides for more full and complete hearing before the commission is no reason for attaching any less weight to the findings of the commission than was attached to them under the old statute. For the purpose of this case, it will be noticed later in this opinion that the evidence in the present case was ample for the court below to reach the decision it did reach, even though it was exercising its independent judgment upon the record, and it will be noticed further that in the case in question the court below made a finding that the order of the commission, which the action seeks to set aside, was reasonable, and this court has held many times that, where such a finding was made, if there was any evidence at all to sustain it, it would not be disturbed on appeal. * * * Evidence was also introduced showing that in another section of Wichita, the southeastern part, the Sisters of St. Joseph had, for five years, been endeavoring to obtain gas service for their large institution located there, and that they were unable to obtain service from appellant company. * * * Here are instances where for many years a considerable number of the public had been unable to obtain gas service from appellant. Wichita is a growing, thriving community. The commission had a right to presume that, with these many instances where public conveni-

ence had not been served by the Wichita Gas Company, many more would occur as the town grew and expanded. Appellant seems to have the notion that, as long as there was a plentiful supply of gas furnished by it at the burner tips to the consumers then on its mains, it had fully discharged its duty to the public. This is not the rule. As long as there were any substantial number of consumers of gas at Wichita who wanted gas and could not get it, the appellant was not meeting the public convenience, and the commission was justified in finding that public convenience required another company, when such a company presented itself ready to serve."

Where the evidence shows a careful consideration of all questions of fact as to the propriety of issuing a certificate for service on the part of the railroad commission, its decision will be sustained, although the court might have reached a different conclusion on the same evidence, as it should not substitute its judgment for that of the commission on such questions of fact and matters of administrative or business policy, for as the court said in the case of *Louisville & Nashville R. Co. v. Matthews* (Fla.), 140 So. 469: "The record in this case, and the opinion and judgment of the railroad commission, show that the commission did on this hearing consider the existing railroad service and the effect of the granting of the certificate upon the railroad transportation facilities within the territory sought to be served by such applicant. The opinion rendered by the railroad commissioners in connection with their order goes into this matter quite fully, and shows that they gave careful consideration to the factors above-mentioned, and, after a discussion and analysis of the facts shown by the evidence, some of which were not before them on the former hearing, reached the conclusion that the applicant had made a sufficient showing of public convenience and necessity to authorize the granting of the certificate as to the intrastate as well as the interstate business. The power and jurisdiction to decide this question was vested in the railroad commission by statute, and we can not say that there was not substantial and competent evidence in the record on this second hearing to support this finding. Even though this court might have reached a different conclusion on the same evidence, this alone would not justify the court in substituting its judgment for that of the commission."

On an appeal from an order of the commission it is the duty of the court to determine whether the order was either unreasonable or unlawful and, in the absence of a finding of either of

these facts, the court must sustain the order of the commission and may not substitute its judgment for that of the commission, because its duties are judicial and those of the commission are legislative or administrative and its orders are presumptively lawful and reasonable. This principle was discussed at length as follows in *Southern Kansas State Lines Co. v. Public Service Comm.*, 135 Kans. 657, 11 Pac. (2d) 985, where the court said in part: "A consideration of these statutory provisions makes it clear that an appellate review of an order of the commission is limited to a determination of two main questions: Was the order unlawful? Was it unreasonable? Touching the first of these, an order of the commission as of any other official board or officer having statutory duties to perform in the sense here used is unlawful if the forms of law prescribed by statute have not been followed in the proceedings leading up to it and included in its terms. * * * Where its findings of fact are based upon substantial evidence and the other matters shown by the record with which that tribunal is authorized to deal, a court is not justified in setting its orders aside because the record shows that a different order or decision than the one made by the commission could fairly have been based thereon. Indeed, there are narrow limits to the authority which the legislature could confer on the court to deal with the sort of powers which may properly be vested in an official board like the commission. * * * And the trial court's finding No. 4 was an unauthorized substitution of the court's judgment for the judgment of the tribunal authorized to determine the point. Finding No. 5 is not of controlling importance. Moreover, it invades the field of prophecy. Who can say that even two truck lines will be sufficient to serve the needs of that territory in the not distant future? Finding No. 6 is not sustained by the record. The fact that a certificate is granted to a competing truck line does not justify an assumption that the commission failed to give due consideration to the service furnished by the plaintiff. Touching the trial court's conclusions of law, the first is a mixed finding of law and fact, and in our opinion it is not a sound statement of the pertinent law nor a fair statement of the pertinent facts. * * * Plaintiff is quite right in stressing the mandate of the statute (Rev. St. Supp. 1931, 66-199) that 'the commission shall give reasonable consideration to the transportation service being furnished by any * * * motor carrier, and shall give due consideration to * * * the effect which such proposed transportation service may have upon other forms of transportation service which are essential and in-

dispensable to the communities to be affected by such proposed transportation service or that might be affected thereby. * * * Of course the commission should give these matters consideration. A conscientious commission would do so if there was no such mandate in the statute. The granting or withholding of certificates is not a prerogative to be capriciously exercised. *Jackman v. Public Service Commission*, 121 Kans. 141, 245 Pac. 1047, *supra*. It is to be exercised with sound discretion to promote the public convenience. But it is the sound discretion of the commission, not that of the courts, which is to be exercised in the issuance or refusal of certificates of convenience and necessity. * * * The court holds that the record does not sustain the finding that the commission failed to give due consideration to the transportation service being furnished by the plaintiff so far as it occupied the field which the grantee of the certificate proposed to serve, nor does it show that the commission ignored the effect the partially competing service of the later certificate holder may have upon plaintiff's business and revenues. Until the legislature shall change the rule announced in *Kansas Gas & Electric Co. v. Public Service Commission*, 122 Kans. 462, 251 Pac. 1097, *supra*, it furnishes as precise a guide for the granting or withholding of certificates as we can suggest: 'In determining whether such certificate of convenience should be granted, the public convenience ought to be the commission's primary concern, the interest of public utility companies already serving the territory secondary, and, the desires and solicitations of the applicant a relatively minor consideration,' page 466 of 122 Kans., 251 Pac. 1097, 1099."

§ 941. **Limitation on powers of commission.**—However in the case of *Prendergast v. New York Tel. Co.*, 262 U. S. 43, 67 L. ed. 853, 43 Sup. Ct. 466, the United States Supreme Court fixed and defined the proper limitation on the power of the commission as follows: "Upon a showing that such reduced rates were confiscatory, the company was entitled to have their enforcement enjoined pending the continuance and completion of the rate-making process."

The proper limitation imposed on the courts in cases on appeal from the findings of the commission is well defined in the case of *Public Utilities Comm. v. Potomac Electric Power Co.*, 261 U. S. 428, 67 L. ed. 731, 43 Sup. Ct. 445, where the United States Supreme Court held that: "This court is, therefore, given jurisdiction to review the entire record, and to make the order or decree which the commission and the district courts should have

made. Such legislative or administrative jurisdiction, it is well settled, can not be conferred on this court either directly or by appeal."

In reversing an order of the commerce commission in its decision that motorbus service as a means of extending street car service is not desirable as a matter of public policy, the court said that this was not a question for the commission to decide. This principle was stated and discussed in part as follows in the case of Central Northwest Business Mens Assn. v. Illinois Commerce Comm., 337 Ill. 149, 168 N. E. 890, P. U. R. 1930B, 485: "In its review of the commission's order, this court is limited to a determination of whether the commission acted within the scope of its authority, whether the order has substantial foundation in the evidence and whether any substantial right has been infringed by such order. *Wabash, Chester & Western Railroad Co. v. Commerce Commission*, 309 Ill. 412, 141 N. E. 212. This court is not authorized to substitute its judgment for that of the commission in order to put itself in place of the commission and try anew the issues presented. * * * In order that the courts may intelligently review the decisions of the commission, the latter must make its findings sufficiently specific to enable the courts to determine whether such decisions are based on such findings, otherwise the courts would be helpless in their efforts to determine that question. * * * It is not given to the commission to determine the public policy of the state. *Public Utilities Commission v. Bartonville Bus Line*, 290 Ill. 574, 125 N. E. 373. The finding that the operation of motorbus service as an extension of street car service is not desirable as a matter of public policy is a finding in a field which the commission may not enter."

Where the railroad commissioners failed to give due consideration to the existing motor vehicle service in protecting it from competition where it was amply serving the public convenience and necessity, the action of the commission will be reviewed by the courts, as is indicated in the case of *Florida Motor Lines, Inc. v. State Railroad Comrs.*, 100 Fla. 538, 129 So. 876, P. U. R. 1931B, 65, where the court said: "In this case it appears from the evidence adduced and from the proceedings had that, in making the order here challenged, the railroad commissioners did not give due consideration to the statutory privileges claimed by the petitioner who was rendering a similar service by buses on the same route, and has adequate buses allocated to the route to amply serve the public convenience and necessity, or to the rights

of the public to exclude all unnecessary vehicles, particularly those that are large and heavy, from operating for hire over the public highways that should be made and kept safe and suitable for general public use and free from undue risks and hazards to the public and from needless wearing use for hire of the roads that are maintained by the public. The order of the railroad commission complained of is subject to review on a writ of certiorari, and the order as made is not warranted by the showing made in the record under the law that is applicable thereto; therefore the motion to quash the writ of certiorari is denied."

The court will review the action of a public service commission which arbitrarily and without substantial evidence granted a certificate for competitive service where the existing service was adequate, because duplicated, competitive service is extravagant and destructive of the existing service and not for the best interest of the public in securing service at the most reasonable rate available, for as the court said in the case of *United Fuel Gas Co. v. Public Service Comm.*, 103 W. Va. 306, 138 S. E. 388, P. U. R. 1927C, 441: "In the present case both gas companies were born of state and municipal action. Why should one of them be destroyed by the commission? Its action is not one of foetal strangulation, but of death of the utility at the hands of its progenitor, by starvation, after reaching its majority. If, as is admitted, the only purpose of the complainant was to get cheaper gas, why was the application not made to the commission to compel the intervenor to reduce its rates? It entered the field as a competitor of the United Fuel Gas Company, and at a greatly reduced rate, and took away a large portion of its patrons. Why not reduce its rates if too high, and not burden the other utility with a service neither desired nor justly imposed upon it? The intervenor is fully equipped to render the service, is in the field with all necessary connections, and is ready and willing to serve its customers. Why duplicate the service to the ruination and destruction of the intervenor and its property? The commission can be conceded no such arbitrary authority. * * * But in our opinion the conclusion reached by the commission in this case is based first on a mistake of law, that it was powerless to deny the relief sought by complainant, for as we have pointed out it has ample authority conferred by statute to limit such relief to what is 'just and reasonable,' 'just and fair,' 'just and proper,' 'just and right,' and 'not contrary to law.' And as declared here * * * we may review the judgment of the commission when 'based on a mistake of law,' or when it acted

arbitrarily and unjustly without evidence to support it, or when its authority has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance and not the shadow has determined the validity of the exercise of the power."

While the commission may allow a reasonable time for determining the reasonableness of a schedule of rates, the courts will not sustain a period of three years for this purpose, because they consider this unnecessary and unreasonable; and while the courts may not fix a rate for service, they will not hesitate to find that a rate that is confiscatory is unreasonable and void because it violates the federal constitutional rights. This principle was reiterated and items of valuation, reasonable rates, and contract relations for service were discussed clearly and fully as follows in the case of *Southern Bell Tel. & T. Co. v. Railroad Comm. of South Carolina*, 5 Fed. (2d) 77, P. U. R. 1926A, 6 (affirmed in 271 U. S. 23, 10 L. ed. 808, 46 Sup. Ct. 363): "After full consideration, therefore, of the original cost, the present cost of construction, the probable earning capacity of the property, the sum required to meet operating expenses, and other relevant matters needful to be regarded in forming a sound judgment, I have reached the conclusion that, under all the circumstances, the value of the property of the complainant, Southern Bell Telephone & Telegraph Company, in the state of South Carolina, is shown by the testimony adduced by it and heretofore discussed. Under the decisions it would seem that the value should be fixed as of the date of the inquiry. The nearest date on which there is available evidence is December 31, 1923. The testimony shows the value as of such date to be somewhat in excess of \$7,000,000. Even from one day to another values will fluctuate a few dollars. I have, therefore, in order to be on the safe side and allow for some errors or changes, adopted a figure somewhat less than that of the actual testimony, and so fix the value at \$7,000,000. * * * Unless clearly confiscatory on their face, it is usually necessary to allow a period for testing a schedule of rates in order to prove their effect. * * * But under the decisions, a period of three years is more than sufficient for this purpose. * * * As I have found, the rates that have been charged under the injunction have yielded for 1923 a net income of six and twenty-five-hundredths per cent on the investment cost of \$6,025,090.70, and of five and twenty-three-hundredths per cent on a valuation of \$7,000,000, while the legislative rates which have been enjoined would have yielded a net income of two and forty-seven-hun-

dredths per cent and two and thirteen-hundredths per cent respectively, on the same basis. * * * By the statute law of this state, the legal rate of interest is fixed at seven per cent with eight per cent allowable by special contract. The evidence satisfied me, and in fact it is a matter of common knowledge that capital invested in South Carolina in banking, merchandising, and other business yields a rate of eight per cent. Under the decisions * * * a public utility company is not expected to earn a less return on the value of its property used and useful in rendering the public service. I therefore find that, under all the facts and circumstances of this case, the complainant's net income should be eight per cent upon the value of its property devoted to the public service in this state. * * * The plaintiff contends that the findings of the master are *prima facie* correct, the presumptions in their favor, and they should not be overruled unless manifestly wrong. * * * There is much to be said in favor of the plaintiff's contention, and indeed the cases sustain that point of view as a general rule. * * * Upon a full consideration of the whole matter, and laying aside for the present any presumption in favor of the correctness of the master's report upon the facts, I have reached the same conclusions that he reached. The facts as found by the master are amply sustained by the evidence. The rates of January 1, 1921, prescribed by the act of the legislature are unreasonable and confiscatory and amount to a taking of plaintiff's property without due process of law, and the act is therefore unconstitutional, null, and void, in so far as the plaintiff is concerned. The evidence is clear and convincing, and I have no reasonable doubt about it. * * * The courts have no power to make rates. The legislature, in order to guard the public from exorbitant rates on the part of public utilities, has the power either by legislative act, or acting through other agencies, such as the railroad commission of this state, to fix reasonable rates; but the legislature can not fix rates so unreasonably low as to amount to confiscation. * * * There is much to be said for the adoption of capital honestly and prudently invested as the basis. The reasons for the adoption of this basis and the difficulties attending the application of the present value rule are strongly set forth in the dissenting opinion of Mr. Justice Brandeis (concurring in by Mr. Justice Holmes) in *State of Missouri ex rel. Southwestern Telegraph Co. v. Public Service Comm. of Missouri*, 262 U. S. 276, 289, 43 Sup. Ct. 544, 67 L. ed. 981, 31 A. L. R. 807; but the majority of the court were of the contrary opinion. In none of the line of cases beginning with

Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. 418, decided in 1898, and ending with *Ohio Utilities Co. v. Public Utilities Commission of Ohio*, 267 U. S. 359, 45 Sup. Ct. 259, 69 L. ed. 656, decided March 2, 1925, did the Supreme Court adopt the rule of capital honestly and prudently invested as a rate basis, but, on the contrary, held to the rule of value at the time of the inquiry as the correct basis. * * * The evidence shows that prices rose during the war and afterwards, especially during 1918, 1919, and 1920. The peak was reached in 1920, and thereafter there was a decline, and in 1922 and 1923 the bottom was reached, and thereafter there was some increase. The evidence further shows that the unit costs and prices and reproduction new cost were based on the prices and values of April 1, 1922, the time the plaintiff undertook its appraisal, and the appraisal was brought down to December 31, 1923, the latter date being the latest practicable date to close the appraisal so as to conform to the rule that the value of the property should be ascertained at the time of the inquiry, and at that time, according to the testimony, there had been no material changes in labor or material costs from those prevailing in 1922. * * * A business concern, and especially a telephone company, must look to the future as well as the present. It is the part of wisdom to forecast the growth of communities they serve and be prepared to meet new conditions as they arise. * * * Of course, proper business prudence also requires that additional equipment for future use, which must in a certain sense be unused for a period of time, should not be laid out, where such additional equipment can as readily be placed in the plant at the time it is needed. But the evidence in this case shows that the provision for future use was not of that character, but a proper provision such as would effect a large saving in the long run. * * * Of course, there is no method of determining depreciation with exact mathematical precision. In physical examination the depreciation rests upon estimates and opinions of witnesses. * * * My own view is that certainly in a case of this kind the actual personal physical examination of the property by competent witnesses and their estimate and opinion of the actual depreciation is a better guide than any of the theoretical methods that have been suggested. The decisions practically sustain this conclusion. * * * The 'depreciation reserve fund' is merely a sum supposed to be set apart to take care of depreciation with a margin over. It is not as a matter of fact actually set aside, but is really simply entered on the books and is in fact a mere matter of bookkeeping. It does not

represent actual depreciation, but only what observation and experience suggest as likely to happen, with a margin over. The law, however, requires actual depreciation to be deducted. * * * The testimony is overwhelming to the effect that both of the contracts are of great benefit to the plaintiff. Under its contract with the plaintiff, the American Telephone & Telegraph Company renders the plaintiff a large number of services which save it enormously in actual money and in other respects. As to the contract with the Western Electric Company, the proof is overwhelming that the purchase of supplies through that company, when resorted to by the plaintiff, has been to the immense advantage of the plaintiff. Under that contract the plaintiff is not compelled to purchase from the Western Electric Company, but only does so when it is to its interest to do so. These contracts have been before the Supreme Court of the United States and other courts and have been uniformly upheld as reasonable, and I find nothing whatever in the facts of the case before me to differentiate it in this respect from the cases decided by the Supreme Court. * * * It is well known that stocks and bonds of such corporations are frequently based upon fictitious values or, as it is commonly spoken of, 'watered' stock. The courts have uniformly refused to consider stocks and bonds as controlling or that they have great weight, but have merely held that they are entitled to be considered. * * * The master reached his conclusions and I have reached mine, in finding the present value, upon due consideration of the original cost of construction, the amount expended in permanent improvements, the present as compared with the original cost of construction, the probable earning capacity under the rates prescribed by the statute, the sum required to meet operating expenses, and other relevant matters in aid of a reasonable judgment."

This same court in a later case found that a schedule of rates after a period of two years' trial, which did not give a reasonable return on the present value of the property used in rendering the service, was confiscatory and should be set aside as in violation of the rights of the public utility, guarantied by the federal Constitution; and that there was no justification for the board of public utility commissioners' arbitrarily determining the proper amount of depreciation, especially where there was evidence of actual observation upon which to determine the amount. This principle was discussed with the rule as to depreciation, valuation, and costs in *Plainfield-Union Water Co. v. Board of Public Utility Comrs.*, 30 Fed. (2d) 846, P. U. R. 1929D, 3, where

the court said: "The sixteen municipalities served contain a population of about 85,000 at present, and it is not denied that they are increasing very rapidly in population, probably at the rate of 4,000 a year. The source of water supply of the plaintiff is at a place called Netherwood, a local name for the eastern part of the city of Plainfield, where the plaintiff owns about thirty acres of land upon which wells were driven in 1890 which have been used continuously ever since. Netherwood is located about in the midst of thirty municipalities. The wells there yield about 8,000,000 gallons of water a day which is conveyed by mains of the company to the various municipalities supplied.

* * * The sixteen municipalities mentioned are solely dependent on the water supplied to them by the plaintiff from its wells, which, by the way, are now very severely taxed. * * * This 1923 schedule of rates so filed was based on a valuation of plaintiff's property of \$3,800,000 exclusive of the plaintiff's source of water supply, the value created by the consolidation agreement made in 1906 and the value of the favorable location of the plaintiff's property in sixteen rapidly growing municipalities. The plaintiff reserved the right to claim the full value of its property if and when deemed advisable. After hearing, the defendant board, on May 22, 1924, filed its report or decision fixing the value of the plaintiff's property for rate-making purposes at \$3,337,000 and prescribed a schedule of rates which, it asserted, would yield to the plaintiff seven and one-half per cent on that sum, if paid in full. A ten per cent reduction for inadequacy of service was also ordered. * * * The plaintiff protested but operated under this schedule of rates, so filed by the defendant, for a period of about two years. It now alleges that in 1924 it was not able to earn more than five and six-hundredths per cent and in 1925 not more than five and four-hundredths per cent on the valuation of the property so fixed by the defendant on May 22, 1924. * * * In the instant case there is convincing evidence of the very same nature. Pieces of pipe installed many years ago were produced. Experts examined these exhibits and testified that they showed no deterioration whatever, and, for the purpose of water mains, were as good as new. They so appeared to me. * * * My conclusion is that there appears no justification for arbitrarily fixing and then deducting huge amounts as and for theoretical depreciation for or on account of these items. Mr. Vermeule testified that in his opinion it would take about \$40,493.06 to render the properties of the plaintiff just as good as new, and when that had been done there would be no reason for deducting any amounts

for theoretical depreciation. Actual observed depreciation will therefore be allowed in the sum of \$40,493.06. * * * Under the evidence in this case an addition of fifteen per cent for overheads would be conservative. * * * So far as the plaintiff is concerned, I do not think it would be fair to fix less than \$100,000 as and for working capital. This amount I shall fix. * * * An allowance for going value was approved in the Middlesex case (N. J.), 140 Atl. 256. My conclusion is that ten per cent is just and reasonable. * * * The 'value of the plant,' is worth \$4,400,000. * * * It appears, from a consideration of these figures, that the returns are clearly confiscatory. And the constitutional rights of the plaintiff have therefore been violated by the defendant board. * * * The master first found the value of the plant to be \$4,400,000. A reading of his exhaustive report indicates that he not only properly considered the rules of law established by the Supreme Court, but properly applied those rules to the testimony adduced before him. The conclusions from the testimony are properly drawn, and we can not take seriously the minute criticisms of this and that finding supported, in our judgment, not only by the evidence, but by the clear weight of evidence. The next question determined by the master is that seven and one-half per cent is a fair return upon fair valuation. * * * Obviously, these returns were not adequate upon the valuation fixed either by the utility board or by the special master, and were confiscatory. * * * There is testimony throughout to support the conclusions of the master, and his findings will be affirmed, and a decree may be entered accordingly, which shall carry the costs." This case was modified by relieving the commission from liability for costs and, as so modified, affirmed in 30 Fed. (2d) 859, where the court said: "We are constrained, however, to modify the decree in respect to costs in the trial court there charged against the public utility commissioners. That body is an unincorporated association of individuals appointed by the state of New Jersey to perform certain state functions and carry out certain state policies. It is wholly without funds, except such as are from time to time supplied it by state appropriations for specific expenditures. The members of the body do not act as individuals, and therefore are not personally liable for costs. Nor, under the established rule, is the state, when sued without its consent, chargeable with costs."

Where the rate fixed by the statute or the public service commission is confiscatory, relief is available in the federal court on the theory that it amounts to the taking of property without just

compensation, but where there is a question as to the reasonableness of the rate in such a case, the court may refuse to enjoin its enforcement and refer the matter to a special master for disposition. This was the plan adopted in the case of *International R. Co. v. Prendergast*, 52 Fed. (2d) 293, P. U. R. 1932A, 161, where the court said: "This bill, in equity, seeks to enjoin an enforcement of state statutes and orders of the public service commission of the state of New York, requiring the plaintiff to operate its street railway at certain maximum rates of fare. The basis of the right to relief is that the rates of fare are inadequate, and, if enforced, would be confiscatory of the plaintiff's property. Plaintiff filed a tariff fixing fares, and the public service commission refused, by the orders in question, to permit them to become effective. Its position is that the rate of return upon the fares now fixed is fair. * * * The plaintiff may maintain this suit in this court on the claim of confiscation of its property without resorting to certiorari proceedings in the state court under the statute. It need not submit to a continual confiscation of its property. Plaintiff claims, in the amended bill, that after a fair trial the present rate of fare does not yield a fair return and it suffers confiscation of its property daily. It was not incumbent upon the plaintiff to petition for rehearing before the commission, nor was it required to resort to another method of relief before continuing its suit properly and timely instituted, and which it held in abeyance pending the trial method. If such rates are confiscatory, it requires the plaintiff to operate in violation of its rights under the constitution, and it entitles the plaintiff to seek relief here. * * * The public service commission has power to regulate all such specified rates where municipalities have granted franchises since the first Public Service Commission law became effective in 1907. *People ex rel. Garrison v. Nixon* (1920) 229 N. Y. 575, 128 N. E. 255; *People ex rel. City of New York v. Nixon* (1920) 229 N. Y. 356, 128 N. E. 245. Since the legislature has the power to regulate rates specified in the municipal consents, no municipality has the power to make a contract whereby the police power of the state is suspended. The rate of fares in Niagara Falls and Lancaster are not contract rates at which the plaintiff has agreed to operate for a period of ninety-nine years, during which time the police power of the state is suspended. They are statutory rates fixed by the railroad law over which the commission has no jurisdiction because the legislature had not delegated that to the commission. *Matter of City*

of Niagara Falls v. P. S. C. (1920) 229 N. Y. 333, 128 N. E. 247.

* * *

"This contrariety of opinions and disputes as to appraisals and the method followed in arriving at such appraisals are matters which can not be decided upon affidavits. The facts may only be ascertained after an opportunity of examination and cross-examination by the parties. Preliminary injunctive relief against the operation of rates promulgated by the state regulatory bodies are granted only when it is clearly demonstrated that the rates in their effect are confiscatory of the utility's property. * * * It is not practical to fully protect the rights of the public in the event that an increase be presently allowed and ultimately found erroneous, and therefore a bond given by the railroad company to return the excess fare in the event that it is found the present rate of fare is nonconfiscatory would not suffice. City of Louisville v. Louisville Home Tel. Co. (1922) 279 Fed. 949 (C. C. A. 6); Ann Arbor R. Co. v. Fellows (1916) 236 Fed. 387. In view of this sharp contradiction as to valuations, operating expense, and earnings, the temporary relief asked for will be denied. A master will be appointed, who will give assurance of prompt disposition of the issues raised by the parties by sitting continuously in hearing the testimony and the respective contentions. It will be a more just guide to ascertain the correctness of the plaintiff's claim of confiscation."

§ 942. Conditions of appeal.—The conditions under which an appeal may be taken and the jurisdiction of the court in such cases is well stated in the case of Hollis v. Kutz, 265 Fed. 451,⁸⁷ where the court said: "It thus appears that proceedings may be instituted by the utilities commission on its own motion, or by a public utility, as in the present case, seeking a readjustment of its rates, or by an interested party, who may make a formal complaint against the utility. This right of action against the utility will lie, whether the matters complained of originate with the utility or grow out of an order of the commission. In any event, however, formal complaint must be filed, hearing had, and a final order obtained from the commission, before the jurisdiction of the courts can be invoked. The equitable proceeding in the Supreme Court of the District of Columbia under paragraph 64 is in the nature of an appeal rather than an original suit. The act contemplates that it shall be heard upon a transcript of the record made before the commission, and not alone upon evidence

⁸⁷ Affirmed in 255 U. S. 452, 65 L. ed. 727, 41 Sup. Ct. 371.

adduced at the trial, though additional evidence may be offered. However, if additional evidence is offered by the plaintiff, differing from that offered at the hearing, the proceedings in equity must be suspended pending further proceedings by the commission."

Where a utilities commission changes rates, this implies that the old rate was unreasonable, and there is no reason for an express declaration of that fact to be made in the record as a condition for the taking of an appeal. This principle was announced and discussed as follows in the case of Consolidated Flour Mills Co. v. Kansas City Gas & Electric Co., 119 Kans. 47, 237 Pac. 1037, P. U. R. 1926B, 47, where the court said: "The objection made to the validity of the order establishing the increased rate is that it does not contain an express recital that the commission found the existing rate to be unjust, unreasonable, unfair, and unjustly discriminatory, or unduly preferential, or in any wise in violation of the laws of the state. The federal Supreme Court, reversing the circuit court of appeals of this circuit (Public Utilities Commission v. Wichita R. & Light Co. (C. C. A.), 268 Fed. 37), in an action brought by another customer of the electric company to enjoin the enforcement of the same order, has held that this omission renders the order void on its face; the ruling being based, however, upon a construction of the statute attributing to it that intention. * * * Where a utilities commission after a hearing changes an existing rate for a higher one, the implication that it had concluded the old rate was too low for some of the reasons assigned by the statute seems to us so clear as to do away entirely with the occasion for an express and formal declaration to that effect in the record. Moreover, we regard the general scope of the act creating the utilities commission and a number of its specific provisions as authorizing and requiring a presumption in favor of its jurisdiction in such a situation as here presented. The statute, as already shown, in set terms makes it necessary for the commission to find that something is wrong with an existing rate before making a change, but does not say that the finding shall be incorporated in the order."

Appeals may only be had from a final order of the commission containing findings of fact, and where the question to be determined is the valuation of the property, no appeal can be taken until this matter is finally decided by the commission and its order entered with the proper findings of fact, for as the court said in the case of Capital Water Co. v. Public Utilities Comm., 41 Idaho 19, 237 Pac. 423, P. U. R. 1926A, 78: "A purported order

or judgment is not an order or judgment simply because it may be designated as such. A paper or pleading is what its contents make it, rather than what it is designated by the one who drew it. The record does not contain papers contemplated by C. S., section 2497, as amended. It does not contain findings of the commission on the main issue which was before it—the valuation of the property of the company. * * * The issue in the instant case remains the same, what property shall the Capital Water Company be permitted to include as a part of the utility property used and useful in its service to the public? That matter was to be determined upon the conclusion of the hearing and fixed by a decision fixing the valuation of the property. The court of appeal of California has held that after an intervention has been permitted, any judgment, except of nonsuit or dismissal, must be on the merits of the action, citing sections 581 and 582 of the Code of Civil Procedure of California, which are the same as C. S., sections 6830, 6831, respectively, *Townsend v. Driver*, 5 Cal. App. 581, 90 Pac. 1071. And in this case, the merits of the action, the issues involved, are the valuation of the property of appellant. When considered with relation to the Public Utilities Act and the provisions thereof for appeal, and the Code of Civil Procedure relative to appeals from the district court, the appeal herein is not from a final decision, but from an interlocutory order, which itself was not appealable, and is premature in the light of all the adjudicated cases. * * * There has been no appeal here from the final order or decision of the commission, made after the conclusion of the hearing, fixing a valuation of the appellant's property."

As an appeal assumes an adjudication or finding by the commission from which the appeal may be taken, a party may not ignore its statutory remedy by appealing to the court for a writ of mandamus to compel the furnishing of public utility service until the matter has been passed upon by the commission, because it involves legislative or administrative questions highly technical in their nature, for which the commission was created and given powers making it the only proper forum to decide such questions of fact in the first instance. This principle and the attitude of our courts regarding the power and authority of the commission and the scope of its duties were clearly indicated in the case of *Earl Carroll Realty Corp. v. New York Edison Co.*, 141 Misc. 266, 252 N. Y. S. 538, P. U. R. 1931E, 297, where the court said: "This is a petition for a peremptory or alternative writ of mandamus to compel the New York Edison Company to furnish

direct current service to the petitioners for their new theatre in the amount supplied before the demolition of petitioners' old theatre in August, 1930. * * * As a matter of fact, it appears that all electric current produced by the Edison Company is in fact alternating current. Where direct current is to be supplied, it is necessary for the electric company to provide an apparatus for changing or converting the alternating current to direct current before delivering it to the user. * * * It appears from respondent's affidavits that Edison direct current is rapidly disappearing as a medium of supply throughout the country. * * * The general policy, and its soundness is not questioned by the petitioners, has met with the approval of the public service commission, whose experts are more competent to pass upon the technical problems involved than are judicial officers. * * * There is no merit in the contention of the petitioners that they may ignore their remedy before the commission as nugatory for the reason that the Public Service Commission Law fails to provide for the formal initiation of proceedings by an aggrieved individual. * * * Certainly sound policy would seem to dictate that courts should not interfere by summary adjudication or by the extraordinary remedy here sought, in matters highly technical in character and often far reaching in their economic consequences, until they have been considered and passed upon by the trained body established for that very purpose and especially equipped to examine into the intricate facts involved in public utility problems."

Where the provisions of the statute for appeal are not followed, the parties have no right to prosecute it and the same may be dismissed, as was indicated in the case of *American Bond & Mortgage Co. v. United States*, 282 U. S. 374, 75 L. ed. 395, 51 Sup. Ct. 118: "Here a suit in equity was brought by the United States to restrain the proprietor of a broadcasting station from disregarding an order of the federal radio commission revoking its license, and from operating in defiance of the provisions of the Radio Act. As in the other case, the appellants admittedly failed to avail themselves of the right of appeal afforded by the act. The reasons stated in *White v. Johnson*, 282 U. S. 367, 75 L. ed. 388, 51 Sup. Ct. 115, * * * for not answering the questions therein certified apply here. The certificate is dismissed."

In distinguishing between vested rights in property and permissive rights to the use of the air, which are based upon a government permit, and in reiterating the well-established principle that statutory provisions for appeal must be followed, the court

will sustain the action of the commission in the reasonable exercise of its power of regulation and refuse to entertain a proceeding until the statutory remedies have been exhausted, as was indicated in the case of *American Bond & Mortgage Co. v. United States*, 52 Fed. (2d) 318, P. U. R. 1932A, 522, where the court spoke as follows: "Appellee brought this suit to enjoin the continued operation of a radio broadcasting station (WMBB-WOK), which was being operated by appellants after the federal radio commission had refused their application for a renewal of license. The district court granted the injunction, and this appeal followed. * * * We are well satisfied that there is a vital difference between the rights of one whose property (in coal land such as was considered in *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, 43 Sup. Ct. 158, 67 L. ed. 322) is confiscated by judicial decree and the rights of one to the use of the air, which right is dependent upon a government permit limited both as to extent and time. The former is vested. The latter is permissive. We are likewise satisfied that appellants are not in a position to attack an order of the radio commission which was within its power to make, without first exhausting the remedies given them by the Radio Act, to wit, by appealing to the court of appeals of the District of Columbia. The view of the Supreme Court on this proposition is clearly indicated in *White v. Johnson*, 282 U. S. 367, 51 Sup. Ct. 115, 118, 75 L. ed. 388, a case similar to the one under consideration, in which similar questions were at the same time certified to the Supreme Court, and in which the certificate was likewise dismissed. * * * The decree is affirmed. * * * Having sought and secured a government permit or license with its attendant benefits, appellants obviously can not later assert rights which were surrendered in order to secure the permit. * * * Moreover, we would be compelled to reach the same conclusion even though appellants had not limited or narrowed their asserted rights by applying for and accepting a limited license or permit. For it has been held by the various courts, that have passed upon the question, that the regulation of broadcasting stations is within the expressly delegated power of congress to regulate interstate commerce. * * * The purpose of federal regulation of radio broadcasting stations was obvious. The confusion which resulted from the uncontrolled operation of such stations was ruinous to all commercial enterprises engaged therein, as well as destructive of the benefit which the public enjoyed as a result of the development of the radio industry. There was but one effective method of

regulation, to wit, through licensing of stations and the limiting of their use to specific wave lengths and to certain kilowatt power. Such regulation necessarily contemplated a reduction of the number of broadcasting stations, or a limitation of hours a station could broadcast, or the lessening of the area (through reduction of power) through which the wave lengths traveled. If congress under the commerce clause of the constitution had the power to regulate this subject, it surely could exercise its power in the only manner which would accomplish the desired end, which was through the elimination of a plurality of broadcasting stations operating on the same wave length in the same territory at the same time. Every investment in broadcasting stations was subject to this exercise of reasonable and necessary regulation by congress. As against such possible regulation there existed no vested right in favor of the investors."⁸⁸

§ 943. **Right of appeal must be reasonable.**—A further limitation on the power and jurisdiction of the commission is well defined in the case of *Van Dyke v. Geary*, 218 Fed. 111,⁸⁹ as follows: "On the authority of these cases and on principle we are of the opinion, and so decide, that said Act 90 of the first legislature of the state of Arizona imposes such penalties and imprisonment as to practically deprive the complainant of the right to appeal to the court to determine the validity of the law and the orders of the corporation commission, and is therefore unconstitutional in that particular. Complainant's contention that the order of the corporation commission is confiscatory presents a mixed question of law and fact. The question is: Are the rates in question so palpably unreasonable and unjust as to amount to a taking of complainants' property without compensation? If so, this court will grant relief; otherwise, the rates must stand."

§ 944. **Appeal available after acting under order.**—Nor is a party taking advantage of an established rate by virtue of that fact precluded from taking an appeal therefrom, for as the court in the case of *Valparaiso Lighting Co. v. Public Service Comm.*, 190 Ind. 253, 129 N. E. 13, said: "We are convinced that the act itself, properly construed, permits a party to appeal to the courts

⁸⁸ This opinion was rendered by the circuit court of appeals, seventh circuit, after it had certified certain questions to the Supreme Court which the last-mentioned court concluded need not be answered. See

American Bond &c. Co. v. United States, 282 U. S. 374, 75 L. ed. 395, 51 Sup. Ct. 118.

⁸⁹ Affirmed in 244 U. S. 39, 61 L. ed. 973, 37 Sup. Ct. 483.

and have any rate or rates with which he may be dissatisfied reviewed, and by accepting one rate he is not precluded from disputing the validity of another rate, even though both rates may be established in the same order. * * * Under that statute there is express legislative authority for reviewing a particular rate without reviewing all of the rates that may be established by the commission. A party might be satisfied with the rate established for gas, but dissatisfied with the electrical rate, and the acceptance of the one does not preclude him from having the reasonableness or the validity of the other reviewed in the courts."

§ 945. **Parties to hearing.**—In defining the duty of the commission to act on petitions to fix or determine rates and in deciding on the proper parties to such action, the court in the case of *State v. Lewis*, 187 Ind. 564, 120 N. E. 129, said: "It is first insisted that the city of Indianapolis is a necessary party to this action for the reason that it is a party to the contract which the relator is seeking to have changed, to the injury of the city and its citizens. This contention can not be sustained. The proposed change in no way affects the contract concerning any governmental function of the city, but it is limited to the rate of fare fixed by the state. * * * In our opinion the petition in the case at bar presented a state of facts over which the commission had jurisdiction, and its refusal to consider the same was error. Our statute makes no provisions for an appeal from such order, nor does the law afford the relator an adequate and specific remedy. This being true, a common-law writ of mandamus will issue to the commission requiring it to take jurisdiction of the petition."

§ 946. **Rates fixed by commissions, not courts.**—That it is the province of the commission and not of the courts to fix rates and stipulate other conditions of service and operation for public utilities was well expressed by the court in the case of *Cincinnati v. Public Utilities Comm.*, 105 Ohio St. 181, 137 N. E. 36, as follows: "It should be stated at the outset of this discussion that it is not the province of this court to fix a rate or to stipulate the kind and character of service to be rendered. * * * It is not intended that depreciation reserve as such should provide for the growth of the plant and for such additional equipment as may be necessary to keep step with the needs of a rapidly growing city. * * * The courts should not definitely determine the rates of dividends which should be paid by any

utility company to its stockholders, because there must necessarily be some premium placed upon thrift, economical administration, and business management, and there must also be some penalty placed upon bad management and wastefulness."

Courts have no authority to fix rates for public utilities or to revise or modify an order of the commission doing so; and in issuing its orders, the commission is limited to the pleadings before it, as is the evidence, for as the court said in the case of *Alton & Southern R. Co. v. Illinois Commerce Commission*, 316 Ill. 625, 147 N. E. 417: "Courts are not rate-fixing bodies, and have no authority of law to fix or establish rates for public utilities. This power belongs to the legislative branch of the state, and has by the legislature been delegated only to the commerce commission. The circuit court, in reviewing an order of the commerce commission, has no authority to revise or modify it, and the circuit court erred in so doing. *Public Utilities Commission v. Springfield Gas Co.*, 291 Ill. 209, 125 N. E. 891; *People's Gas Co. v. City of Chicago*, 309 Ill. 40, 139 N. E. 867. * * * While the commission should be liberal in construing the pleadings before it, the statute requires that carriers shall be notified of the complaint which they are required to answer, and, though no particular form is prescribed, there must be a statement of the thing which is claimed to be wrong sufficiently plain to put the carrier upon its defense. The evidence should be limited by the issue made. The commerce commission can not enter a valid order which is broader than the written complaint filed in the case. *Public Utilities Commission v. City of Dixon*, 292 Ill. 521, 127 N. E. 143; *Oregon Railroad & Navigation Co. v. Fairchild*, 224 U. S. 510, 32 Sup. Ct. 535, 56 L. ed. 863."

While the court has no authority to fix rates or make classifications for doing so, it may pass upon the legality and reasonableness of an action of the commission in these matters, as was decided in *Alabama Power Co. v. Alabama Public Service Comm.*, 214 Ala. 164, 107 So. 71, P. U. R. 1926C, 292, where the court said: "The order of the commission appealed from, dated July 7, 1922, directs said power company thereafter to classify the users or operators of X-ray machines as lighting customers, and to charge them at the rates then in effect for such customers—X-ray customers having been theretofore classified by the company as retail power customers, and required to pay the rates and charges established for that class of customer. * * * As we have already observed, the technical accuracy of the classification complained of is not a matter of controlling impor-

tance. Our judgment is that the X-ray machine is not a power machine in the ordinary sense, nor is it a lighting device in the ordinary sense, though it has features analogous to both. But this court is without authority to make classifications or rates; it can only pass judgment upon the legality and reasonableness of the action of the commission in that behalf, and nullify or sustain that action accordingly."

While courts can not fix rates, they may review the action of the commission in doing so and in determining the proper rate base, and if the return realized from the rate fixed is unreasonable and confiscatory, the court will set it aside as being in violation of the federal Constitution. The courts have also indicated that rates should not be confused with dividends which the company pays, for these are not the only or in some cases even the major portion which must be realized from earnings to maintain the plant in an efficient operating condition. This principle was stated and discussed as follows in the case of Consolidated Gas Co. v. Prendergast, 6 Fed. (2d) 243, where the court said: "But, in view of the court's conclusion that the act is unconstitutional, confiscatory, and void, even with these debatable items decided by the master against the plaintiff, it is not necessary for this court to pass on these specific matters. It may not be amiss, however, to make some observations concerning this and other litigation of like character. At the outset, it must be emphasized that it is the property, and not the original cost, which the owner may not be deprived of without due process. The present value of the property must here be the goal of investigation, and present value must be expressed in terms of present money. While reproduction cost, less depreciation (if proven), is the dominant element in determining a rate base, it is not, of course, exclusive of other elements. * * * It is also the court's conclusion that at the present time a reasonable rate of return, according to well-recognized custom in a regulated business like this, is not less than eight per cent. The rate of return on the property is not to be confounded with the amount of dividends that a corporation might pay on its capital stock. Indeed, according to all successful business experience, a corporation paying out in dividends all or even the major part of its net earnings is courting speedy disaster. * * * The power of the legislature to change the rate after the expiration of the 'period of repose,' subject to constitutional restriction, is, of course, conceded as elementary."

This decision, holding the statutory rate to be confiscatory, was sustained and the statute held void for that reason only, in the opinion thus modified in *Ottinger v. Consolidated Gas Co.*, 272 U. S. 576, 71 L. ed. 420, 47 Sup. Ct. 198, where the court said: "As the statute is clearly confiscatory and therefore invalid under the Fourteenth Amendment, it was unnecessary for the trial court to consider other objections thereto, and we have not done so."

While rates for public utility service are fixed by the commission, where the courts grant injunctive relief from an order of the commission fixing rates, they frequently, as a condition of granting such relief while the matter is pending, prescribe the rate and sometimes the condition of its payment; although naturally it is not within the province of the court to fix rates permanently. This principle was announced and discussed as follows in the case of *Trautwein v. Moreno Mutual Irrigation Co.*, 22 Fed. (2d) 374: "This is an appeal from a decree granting an injunction *pendente lite*. * * * The principal contention of the defendants seems to be that the injunction deprives them of their property without compensation and without due process of law, but this contention assumes the very question in issue. If the defendants are right in their contention that they are not a public utility, or common carriers, of course the temporary restraining order has the effect claimed; but if they are a public utility, or common carriers, a decree which compels them to discharge their public duty upon payment of the compensation prescribed by law does not take their property, or deprive them of their property, without due process of law. In the many cases in which injunctions have been granted to compel public service corporations to discharge their public duties, no such contention has ever been made or sustained. It is further contended that the railroad commission of the state has no power to declare what shall constitute a public utility, that executors and administrators can not burden the property of the heirs by the use made of it in the course of administration, and that an attorney-in-fact is equally lacking in power; but those are all questions for consideration when the case is heard on the merits. On the present hearing, the courts are only concerned, with the single question: Did the plaintiffs make out a *prima facie* case? The right of the plaintiffs to the injunction granted is not entirely clear. * * * The defendants have the facilities to discharge the duty imposed by the decree. They have been discharging that duty in the past, and are willing to do the same

thing at the present time and in the future at their own volition and under an express contract; but they decline to do so as a matter of legal obligation. The court, therefore, has required of the defendants little more than they themselves express a readiness to do, but under somewhat different conditions. The order of the state court and the original of the federal court fixed the compensation to be paid to the defendants at the average rate charged by them for the like service during the preceding six months, and it is apparent from this that the defendants will suffer no material injury. * * * As an abstract question, it is doubtless true that a court has no power to establish rates; but it has power to prescribe the conditions upon which injunctive relief shall be granted, and it has been uniform practice in rate cases to prescribe the rate to be paid during the pendency of the suit. In no other way can complete equity be done. It would certainly be inequitable to compel the defendants to perform the service without payment of the compensation to which they are admittedly entitled and relegate them to some other forum, or to an action on the bond to recover their compensation."

§ 947. **Orders founded on findings of fact.**—In the case of *Wichita R. & Light Co. v. Public Utilities Comm. of Kansas*, 260 U. S. 48, 67 L. ed. 124, 43 Sup. Ct. 51, Chief Justice Taft said: "The proceeding we are considering is governed by section 13. That is the general section of the act comprehensively describing the duty of the commission, vesting it with power to fix and order substituted new rates for existing rates. The power is expressly made to depend on the condition that, after full hearing and investigation, the commission shall find existing rates to be unjust, unreasonable, unjustly discriminatory, or unduly preferential. We conclude that a valid order of the commission under the act must contain a finding of fact after hearing and investigation, upon which the order is founded, and that, for lack of such a finding, the order in this case was void. This conclusion accords with the construction put upon similar statutes in other states. Moreover, it accords with general principles of constitutional government. The maxim that a legislature may not delegate legislative power has some qualifications, as in the creation of municipalities, and also in the creation of administrative boards to apply to the myriad details of rate schedules the regulatory police power of the state. The later qualification is made necessary in order that the legislative power may be effectively exercised. In creating such an administrative agency,

the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined, and show a substantial compliance therewith, to give validity to its action. When, therefore, such an administrative agency is required, as a condition precedent to an order, to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective."

As all orders of public service commissions are entered on findings of facts, based upon material evidence, the courts are not in a position to pass upon issues raised on affidavits in the absence of evidence and proper findings of facts, as was indicated in the case of *Home Tel. & T. v. Kuykendall*, 265 U. S. 207, 68 L. ed. 982, 44 Sup. Ct. 557, where the court said: "These appeals present the same question as that just considered and decided in the appeal of the Pacific Telegraph & Telephone Company against the same appellee. * * * There is no difference in the cases except that, on the motion for a temporary injunction, an affidavit of the assistant corporation counsel of Spokane was filed, which set forth, among other reasons for denying an injunction, an ordinance of the city of Spokane of April, 1909, in which rates for telephone service by the Home Telephone Company in that city were fixed in a schedule much lower than the one said to be necessary for a fair return, and alleged that the ordinance was still in full force and effect, was a valid contract between the city and the company, and that thus the bill of the plaintiff must fail. Upon argument and brief in this court, counsel for the company insist that, under the decision of the Supreme Court of Washington in *State ex rel. Spokane Falls Gaslight Co. v. Kuykendall*, 119 Wash. 107, 205 Pac. 3, action of the city in reducing the rates of the ordinance in 1913 and increasing them in 1919 must be held to terminate the contract of the ordinance, and bring the rates within the regulation of the public service commission, or its successor, the department of public works. It is obvious that, upon this appeal, we could not safely pass upon an issue raised upon an affidavit, and not shown in the bill."

Where the statute requires the court to make its special findings of fact, as is the case in Pennsylvania under the Act of 1931, the record of the commission must set out at length its special findings of fact, in order that the court may pass upon the validity of their findings and use them as the basis for the

findings of fact and conclusions of law which the statute requires of the court. This principle was established and discussed as follows in the case of Scranton-Spring Brook Water Service Co. v. Public Service Comm. (Pa.), 160 Atl. 230, where the court said: "Prior to that statute, if the only complaint was that a rate was unreasonably high, this court could only inquire whether there was sufficient competent evidence to support the order. Lewistown Borough v. Public Service Comm., 80 Pa. Super. Ct. 528, and cases there cited. This court then had not been authorized in such cases to make independent findings of fact and to substitute them for those of the commission. It is obvious, therefore, that the Act of 1931 has made a very radical change in the method of establishing rates and for the review of a rate order. The statute has thus produced, not only a change in the function of the court in reviewing the record, but also, of necessity, an important change in the manner in which the commission must perform its duties in such cases. * * * It is essential that the report of the commission, or the record, in some way disclose precisely the elements involved and the processes and methods by which the commission reaches its findings and conclusions on the evidence. * * * If we are to determine whether or not the 'findings' are reasonable and proper, we must have definite and specific findings to consider. There is no presumption, upon these appeals, in favor of the final conclusions as to value reached by the commission upon any particular item or classification of items of physical property or as to overheads. Nor does a statement by it that it has given due consideration to the respective contentions of the parties and, after considering all the elements entering into the problem, has arrived at a certain conclusion, furnish any basis for a review of its conclusions. * * * The company is entitled to have the value of its property considered, and that means all its property used and useful; the cities are entitled to see that such property is not considered at more than its value, and, as long as it is the duty of this court to make independent findings, all such property must be considered by the court, and the commission must furnish to the court its valuations in detail, together with the reasons for its conclusions, in order that the court may comply with the statute. * * * In the absence of any evidence as to an actual or historical lag in the building up of business, the calculations of the company's engineers, based wholly on a theoretical lag, are insufficient to support an allowance for 'going concern value.' * * * If the company's schedule of rates, as filed by it, is substantially sus-

tained, allowance should be made for the reasonable expense—not necessarily the actual outlay—to which it was put in order to uphold it. On the other hand, if the schedule filed is decided to have been substantially greater than the just, fair, and reasonable rates it was entitled to charge, there is no reason why the public should be asked to bear the expenses of the litigation brought on by its filing a schedule of rates found to have been greatly excessive. For the reasons stated, we are all of opinion that the report is so lacking in specific findings that it is impossible 'to determine whether or not the findings made and the valuations and rates fixed by the commission are reasonable and proper.' * * * We must therefore remit the record to the commission, with directions to make specific findings as to the property considered by it in fixing the rate base, and the quantities and unit prices adopted under the various classifications; also to state the facts and methods on and by which it arrives at its conclusions concerning allowances for overheads, and the manner in which it calculates accrued and annual depreciation, and, generally speaking, for further action not inconsistent with this opinion."

§ 948. **No appeal from orders of approval of lease.**—Another limitation on the right to appeal from the finding of the commission in the matter of approving a lease contract was indicated by the court in the case of *Fishback v. Public Service Comm.*, 193 Ind. 282, 138 N. E. 346, P. U. R. 1923C, 682, as follows: "The approval of a lease of the property of one public utility corporation by another is a legislative act, from which no appeal lies to the courts, and the remedy sought by appellant by each paragraph of its complaint was to enjoin performance of the contract of lease, for the alleged reason that the public service commission had exceeded its authority in approving the lease, and the gas companies had failed to perform certain conditions precedent upon which their power to enter into the lease was alleged to depend. An appeal from the judgment in such an action must be taken under the General Practice Act, within 180 days, and is not governed by the statute requiring an appeal from an order fixing rates to be perfected within sixty days, or within such further time as the Supreme Court may grant."

Where the decision of a commission or department of government is made final under the statute, so that contract or property rights created or effected by them are vested, they may not be overthrown, and are not subject to further consideration. The original decision may not be modified or supplanted because the

statute makes it conclusive and rights created thereby become vested. This principle was discussed and established as follows in the case of *Wilbur v. Burley Irrigation District*, 58 Fed. (2d) 871, where the court said: "The Acts of 1924 and 1926 (44 Stat. 481), under which Secretary Work proceeded, specifically prescribed that his decision should be conclusive and final. It is clear, therefore, that any attempt on the part of the present secretary to revise, modify, or change these contracts is an interference with property rights already vested; a matter over which the jurisdiction of the secretary no longer exists. It is important to note that the injunction here extends only to the redetermination by the secretary of the proportionate ownership in the Minidoka power project by the Minidoka and Burley irrigation districts. The secretary possesses certain administrative powers over the distribution of the proceeds received from the operation of the power plant. He has power to credit the net profits annually: First, to the construction charge of the project still remaining due the government; second, to the operation and maintenance; and, third, as the water users may direct. The injunction in no way interferes with his direction and supervision of the operation of the project to this extent; it simply prohibits the secretary from redetermining the respective property interests that the districts have in the entire project under their respective contracts with the government. It is elementary that where an officer is charged with the duty of making a final determination of a question involving the property rights of a person, company, or corporation, with respect to the interest of the government therein, injunctive relief to restrain the officer in the process of the performance of his duty will not be granted. But that is not this case. Where a final determination has been made and property rights as a result thereof have become vested, it is not within the jurisdiction of the determining secretary or his successor in office to review or revise it, and any attempt at such action will be enjoined by the courts."

§ 949. **No appeal from orders of sale.**—That a rule similar to the one governing leases obtains in cases of sales of property by and between public utilities was indicated in the case of *Public Service Comm. v. Indianapolis*, 193 Ind. 37, 137 N. E. 705, where the court held that: "Interpreted in the light of the facts we have stated, the provisions * * * clearly authorize any and all corporations organized and operating as public utilities to buy from and sell to each other, on terms fixed by the commission, whether they do or do not own and operate intersecting or

parallel lines or conduct their business in the same locality. Burns' 1914, section 10052r3. This section * * * does not forbid the purchase and sale which the complaint in this case alleges certain of the appellees to be intending, but expressly authorizes it if duly approved by the commission and consented to by stockholders. * * * The proposed sale by certain companies to another company of property owned by them does not constitute a merger or consolidation, and no question is presented for decision as to the right or power of these companies to merge or consolidate. The consolidation of corporations is wholly different in law from a sale of property by one to another."

§ 950. **Nature of power of appeal defined.**—In the case of *Keller v. Potomac Electric Power Co.*, 261 U. S. 428, 67 L. ed. 731, 43 Sup. Ct. 445, Chief Justice Taft again considered the question of appeals from commissions as follows: "What is the nature of the power thus conferred on the district supreme court? Is it judicial or is it legislative? Is the court to pass solely on questions of law, and look to the facts only to decide what are the questions of law really arising, or to consider whether there was any showing of facts before the commission upon which, as a matter of law, its finding can be justified? Or has it the power, in this equitable proceeding to review the exercise of discretion by the commission and itself raise or lower valuations, rates, or restrict or expand orders as to service? Has it the power to make the order the commission should have made? If it has, then the court is to exercise legislative power in that it will be laying down new rules, to change present condition and to guide future action, and is not confined to definition and protection of existing rights. * * * Under the law, the proceeding in the district Supreme Court is of a very special character. The court may be called in to advise the commission as to the elements of value to be by it considered, at any stage of the hearing before the commission. To modify or amend a valuation, or a rate, or a regulation of the commission as inadequate, as the court is authorized to do, seems to us necessary to import the power to increase the valuation or rate, or to make a regulation more comprehensive, and to consider the evidence before it for this purpose. In other words, the proceeding in court is an appeal from the action of the commission in the chancery sense."

§ 951. **Rate established by orders presumed to obtain pending appeal.**—Pending the appeal the rate established from which

such appeal is taken prevails until or unless it is set aside, in the absence of express provision to the contrary, for as the court said in the case of *Utah-Idaho Central Railway Co. v. Public Utilities Comm.*, 64 Utah 54, 227 Pac. 1025: "If a party who is affected by a rate may apply for and receive reparations every time a rate is reduced, it follows that every time the rate is raised the party furnishing the service must also be permitted to apply for and receive the amount of the increase. There would, thus, never be any point at which a rate could be said to be permanent. The fact is that in the very nature of things the rates promulgated by the commission must be deemed permanent, unless the commission expressly provides to the contrary, and in the order itself provides what the rights of the parties shall be, with respect to the rates. Moreover, rates or charges for services rendered by a public utility like those rendered by the company in the instant case, in the very nature of things, require adjustment either up or down from time to time, as changes in conditions or circumstances may require. The rates that are promulgated must, however, be deemed the rates to be charged upon the one hand and paid upon the other, whether they continue in force for a long or short period, unless the commission orders otherwise in the order promulgating the rates. After a careful scrutiny of the record we are forced to the conclusion that there is nothing made apparent upon which we could base a justification for interfering with the commission's decision."

The courts will respect an order of the public service commission in fixing rates based on the best information then available to the commission, and in providing that such rates shall be continued for a year in order to determine more equitably, if possible, just and reasonable rates, as was indicated in the case of *State v. Public Service Comm.*, 308 Mo. 328, 272 S. W. 971, where the court spoke as follows: "These contracts are of no vitality, in so far as they affect rates. The public service commission, in fixing rates, can not be clogged or obstructed by contract rates. * * * The effect of this and subsequent holdings is that contract prices count for naught in the fixing of rates by the public service commission. The public service commission is not a court, and can not be influenced in any regard by the contract prices as to rates. * * * The fixing of a rate for a public commodity, as we have here, falls under the police power of the state. From the beginning we have so ruled. This constitutional provision disrobes the contention of interveners as to private contract rights. They are not private contract rights, and when so viewed, there is no substance to these sundry contracts.

* * * After a full investigation as to the increased cost of its products, the commission entered a trial order or judgment. By the terms of this the matters were to be tested for a year, and the data kept and gathered for its information. The rates were not permanent, but rates based upon the best information then before the commission. If, at the end of the year, the experiment showed a wrong conclusion, it could be set aside, and new rates fixed. We are dealing solely with these experimental rates. Not only so, but with experimental rates as to steam heat. This court will be slow to interfere with the public service commission, when they order an experiment to be made, in order that equitable rates may be determined."

Rate regulations by public utility commissions, being legislative and not judicial matters, the court will not assume jurisdiction in such matters until they have been passed upon by the commission, as was indicated in the case of *McCullum v. Southern Bell Tel. &c. Co.*, 163 Tenn. 277, 43 S. W. (2d) 390, P. U. R. 1932A, 462, where the court said: "The authorities hold without exception that utility commissions are administrative bodies and not courts, and that the power conferred upon them to fix rates is legislative and not judicial. * * * While the act of 1919 does not expressly state that the fixing of rates by the public utilities commission is exclusive, such, in our opinion, was the legislative intent, and by the great weight of authority the courts do not have jurisdiction over such matters until they have been submitted to and passed upon by the commission. 51 *Corpus Juris*, 41, 42, and note."

As it is not within the province of the court to exercise its independent judgment on matters of administrative or business policies, it will refuse to act until it appears that the action of the commission is unreasonable or in excess of its powers, for as the court said in the case of *Broadway Auto Livery v. State Board of Public Works (R. I.)*, 158 Atl. 375: "While the business of the complainant may have some of the features of an auto livery, there was evidence before the board upon which it could have reasonably found that the complainant was 'soliciting passengers indiscriminately for transportation for hire,' and, therefore was doing such business in violation of said chapter 1552. It is not within the province of the court to exercise independent judgment on questions of administration which have been left by the legislature to an administrative board for determination. It is only when it appears that such board has exceeded its powers or has acted unreasonably or arbitrarily that its orders will be disturbed."

CHAPTER 34

STATE REGULATIONS, RESTRICTIONS, AND TAXES ON MOTOR VEHICLE CARRIERS

| Section | Section |
|---------------------|----------------------|
| 955. Alabama. | 979. Nebraska. |
| 956. Arizona. | 980. Nevada. |
| 957. Arkansas. | 981. New Hampshire. |
| 958. California. | 982. New Jersey. |
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| 962. Florida. | 986. North Dakota. |
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| 967. Iowa. | 991. Rhode Island. |
| 968. Kansas. | 992. South Carolina. |
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| 970. Louisiana. | 994. Tennessee. |
| 971. Maine. | 995. Texas. |
| 972. Maryland. | 996. Utah. |
| 973. Massachusetts. | 997. Vermont. |
| 974. Michigan. | 998. Virginia. |
| 975. Minnesota. | 999. Washington. |
| 976. Mississippi. | 1000. West Virginia. |
| 977. Missouri. | 1001. Wisconsin. |
| 978. Montana. | 1002. Wyoming. |

This chapter contains memoranda of the regulations, restrictions, and special taxes on motor vehicle carriers in force in the respective states on July 1, 1932. No effort has been made to include later laws.¹

§ 955. Alabama.—In Alabama, motor transportation companies are regulated by the public service commission. The commission control applies to passenger or/and property carriers between municipalities. As a prerequisite of operation the operator must make application, accompanied by the application fee, for a certificate of convenience and necessity; and indemnity bond or insurance is required.² Municipalities may regulate motor vehicles.³

¹ For federal tax, see Barnes Fed. Code Supp. 1924, § 5632k, cl. 8.

² Alabama Laws 1931, Act 273.

³ Alabama Code 1928, § 2163.

There are restrictions as to size, length, and weight, including load, of motor vehicles and combinations of motor vehicles,⁴ and as to speed.⁵ The state highway commission may give written permission to meet temporary and unusual conditions.⁶

In addition to a personal property tax and fee for certificate of convenience and necessity, motor carriers are charged special mileage taxes.⁷ Municipalities may collect reasonable privilege licenses or taxes from motor transportation companies doing business therein.⁸

§ 956. *Arizona.*—In Arizona the corporation commission has control over motor vehicle carriers of passengers and property both within and between cities. As a prerequisite of operation the carrier must secure a certificate of public convenience and necessity from the commission and keep a bond in force satisfactory to the commission. The commission has power to issue certificates of necessity and convenience, to regulate service and to fix rates and fees.⁹

There are restrictions upon motor vehicles of width, height, length of combination of vehicles, weight, weight per axle, and per width of tire, and speed, depending upon the population of the community through which the vehicle is operating, its capacity, and kind of tires. The state highway commission may issue written permits for operation of restricted vehicles.¹⁰

In addition to the regular registration and license fees, motor carriers are required to pay a special highway fee,¹¹ and a license tax based upon gross receipts.¹²

§ 957. *Arkansas.*—In Arkansas motor vehicle carriers are under the control of the railroad commission. They must make application, accompanied by the application fee, for a license certificate, or permit, and provide indemnity bond or insurance. Such carriers, except those operating within, or within and near, city limits, must pay an excise or privilege tax based upon gross receipts,¹³ and additional four per cent of gross receipts.¹⁴ Mo-

⁴ Alabama Laws 1931, Act 146, p. 208.

⁵ Alabama Code 1928, § 6267.

⁶ Alabama Laws 1931, Act 146.

⁷ Alabama Laws 1931, Act. 27, § 5.

⁸ Alabama Laws 1931, Act 273, § 59.

⁹ Arizona Rev. Code 1928, §§ 736-741.

¹⁰ Arizona Rev. Code 1928, § 1587 et seq.

¹¹ Arizona Laws, 1st Spec. Sess. 1931-1932, ch. 1.

¹² Arizona Rev. Code 1928, § 1680.

¹³ Arkansas Laws 1927, Act 99, as amended by Laws 1929, Act 62, Laws 1931, Act 239.

¹⁴ Arkansas Laws 1929, Act 65, § 67, as amended by Laws 1931, Act 239.

tor vehicle carriers operating within, or within and near city limits, may be regulated and taxed by the cities.¹⁵

There are restrictions on motor vehicles, concerning the width, height, length, length of combination of vehicles, weight regulated according to number of wheels and kind of tires, weight of trailer load,¹⁶ and speed of passenger cars and trucks.¹⁷ These restrictions can be revised by proper officials in charge of highways.¹⁸

§ 958. California.—In California motor vehicle carriers are regulated by the state railroad commission. The commission's jurisdiction is over intermunicipal carriers. A certificate of public convenience and necessity is a prerequisite of operation. The commission may grant, refuse, suspend, revoke, or amend certificates of public convenience and necessity, prescribe service, fix rates and schedules, supervise fiscal affairs and authorize sale or lease of certificate of public convenience and necessity.¹⁹

There are restrictions of width, height, length, and length of combination of vehicles, weight, depending on the number of wheels, number of axles and distance between axles, kind and size of tires, speed, depending on the place of operation, and weight of the vehicle. The state department of public works and local authorities may issue special permits.²⁰

Besides registration fees, and fees for certificate of convenience and necessity, motor carriers must pay a tax on gross receipts of four and one-fourth per cent for carriage of passengers and five per cent for carriage of property.²¹

§ 959. Colorado.—In Colorado the regulation of motor vehicle carriers is entrusted to the public utilities commission. Its jurisdiction extends both within and between municipalities. A certificate of public convenience and necessity is prerequisite to operation, and indemnity bond or insurance must be provided. The state agency has wide control over the issuance of certificates of public convenience and necessity. It may prescribe rules for the service and extensions of service, and fix rates.²²

¹⁵ Arkansas Laws 1931, Act 239.

¹⁶ Arkansas Laws 1924, Spec. Sess., p. 26.

¹⁷ Crawford and Moses' Arkansas Dig. of Stat. 1921, § 7426.

¹⁸ Crawford and Moses' Arkansas Dig. of Stat. 1921, § 5509.

¹⁹ Deering's California Gen. Laws 1931, Act 5129.

²⁰ Deering's California Gen. Laws 1931, Acts 5128, 5130.

²¹ Deering's California Gen. Laws 1931, Acts 5128, 5130.

²² Colorado Laws 1927, ch. 134, as amended by Laws 1931, ch. 121; and Public Utility Law, Colorado Comp. Laws 1921, §§ 2911-2977, setting out

There is a restriction as to speed, width, length, and load.²³ The secretary of state is empowered to administer and enforce the provisions of the Uniform Motor Vehicle Law.²⁴

In addition to the registration fees and fees for certificates of convenience and necessity, motor vehicle carriers, not operating exclusively within the limits of an incorporated town or city, must pay a highway tax based upon ton miles and passenger miles.²⁵

§ 960. **Connecticut.**—In Connecticut the public utilities commission has charge of motor vehicles operating as common carriers of passengers. A certificate of public convenience and necessity is a prerequisite of operation.²⁶ Indemnity insurance or bond, or showing of financial responsibility, is required.²⁷

There are restrictions on motor vehicles on width, height, length of combination of vehicles, weight, weight per axle, weight per width and thickness of tire. The state highway commission may raise or lower weight restrictions on roads under their jurisdiction.²⁸ There are no special speed restrictions, but the speed at which the vehicle is driven must be reasonable and not reckless. Certain acts are declared reckless.²⁹

Besides the regular registration fees, operators of common carrier motor vehicles must pay special excise fees, based upon gross receipts, or/and mileage, for the use of the highways.³⁰

§ 961. **Delaware.**—In Delaware there is no law relating to motor vehicles as public utilities. There are restrictions on width, height, gross weight, weight per trailer, weight on one axle, weight per width and kind of tires, speed depending on gross weight, kind of tires, and place of operation. The highway department may lower or raise weight restrictions and the levy court of any county may lower weight limits during certain months.³¹

the power of the commissions over utilities.

²³ Colorado Laws 1931, ch. 122.

²⁴ Colorado Laws 1931, ch. 122.

²⁵ Colorado Laws 1927, ch. 134.

²⁶ Connecticut Gen. Stat. 1930, §§ 3601, 3850-3861, and Laws 1931, ch. 204.

²⁷ Connecticut Gen. Stat. 1930, § 1568, and Laws 1931, ch. 82, § 280a.

²⁸ Connecticut Gen. Stat. 1930, §§ 1470, 1471, 1594, 1599, 1646-1648, and Laws 1931, ch. 83.

²⁹ Connecticut Gen. Stat. 1930, §§ 1581, 1582.

³⁰ Connecticut Gen. Stat. 1930, §§ 1310-1315.

³¹ Delaware Laws of 1929, vol. 36, ch. 10, as amended by Laws of 1931, vol. 37, ch. 10, and Laws of 1931, vol. 37, ch. 12, relating to tractors.

There are no additional taxes upon motor vehicles operating as common carriers, except in the city of Wilmington.³²

§ 962. **Florida.**—In Florida, motor transportation common carriers are subject to supervision and regulation by the railroad commission.³³ Certificates of convenience and necessity and indemnity bonds are required.³⁴ There are restrictions as to size, weight, and speed of motor vehicles.³⁵ Special equipment is required.³⁶ Mileage tax is required, in lieu of other taxes, except license taxes.³⁷

§ 963. **Georgia.**—In Georgia the public service commission has control over motor vehicle carriers of persons and property, either or both, and not generally operating exclusively within corporate limits of cities or towns. Certificates of convenience and necessity are prerequisites of operation. Indemnity bonds or insurance must be provided or financial ability shown.³⁸ There are restrictions as to size, weight, and speed.³⁹

Subdivisions of the state, including cities, municipalities, villages, townships, or counties, are prohibited from levying any excise, license, or occupation tax on motor vehicle carriers.⁴⁰ Besides regular registration fees and taxes, motor vehicle carriers are required to pay fees for certificates of convenience and necessity and a special annual registration fee.⁴¹ Operators of motor vehicles for hire, whether common carriers or not, are required to pay special taxes, based upon weight, capacity, and/or mileage.⁴²

§ 964. **Idaho.**—Auto transportation companies are regulated by the public utilities commission. Permission of the commission and provision for indemnity are prerequisites to operation. The commission has general power over such companies.⁴³ There are restrictions on motor vehicles as to size, weight, speed,

³² Delaware Laws 1921, ch. 115, p. 350.

³³ Florida Comp. Gen. Laws Supp. 1932, § 1335(7).

³⁴ Florida Comp. Gen. Laws Supp. 1932, §§ 1335(2)-1335(6).

³⁵ Florida Comp. Gen. Laws Supp. 1927, § 1318; Florida Comp. Gen. Laws Supp. 1932, §§ 1335(11), 1335(12).

³⁶ Florida Comp. Gen. Laws Supp. 1932, § 1335(13).

³⁷ Florida Comp. Gen. Laws Supp. 1932, § 1335(15).

³⁸ Georgia Laws 1931, Act 243.

³⁹ Georgia Laws 1931 (E. S.), Act 11, p. 114.

⁴⁰ Georgia Laws 1931, Act 243, § 18.

⁴¹ Georgia Laws 1931, Act 243, §§ 17, 18.

⁴² Georgia Laws 1931 (E. S.), Act 10, p. 63, as amended by Georgia Laws 1931, Act 294, p. 90.

⁴³ Idaho Code 1932, §§ 59-801—59-817.

load, size of tires, and equipment. The commission of public works may place other restrictions on vehicles, and this board, and also the board of county commissioners, may issue special permits of operation within their jurisdiction.⁴⁴

In addition to regular registration fees and motor fuel taxes, auto transportation companies are required to pay a fee of twenty-five dollars for a permit from the public utilities commission, and a special tax based upon gross revenue and passenger or tonnage capacity.⁴⁵

§ 965. *Illinois.*⁴⁶—In Illinois the commerce commission has control over the regulation of motor vehicles. The commission's jurisdiction extends to carriers both of passengers and property within and between municipalities. A certificate of public convenience and necessity⁴⁷ and provision for indemnity⁴⁸ for each vehicle are prerequisites of operation. The commission may grant, refuse, or modify certificates of public convenience and necessity and regulate rates, fares, service, contracts, practices, etc.⁴⁹ There are restrictions on the width, length of combination of vehicles, gross weight, weight per axle, weight per kind of tires,⁵⁰ speed depending on the kind of vehicle, location, kind of tires, and load carried.⁵¹ Highway officials may limit weights at certain seasons of the year, and such officers may issue permits to operate a combination of vehicles longer than provided for in the restrictions.⁵²

Besides the regular registration fees, motor vehicles operating as common carriers are charged additional fees depending on the gross weight of the vehicle and load.⁵³

§ 966. *Indiana.*—In Indiana, motor vehicle common carriers are under the control of the public service commission. Certificates of convenience and necessity are necessary, and a bond, indemnity undertaking, or insurance is required.⁵⁴ Motor ve-

⁴⁴ Idaho Code 1932, §§ 48-501—48-567, 48-601—48-611.

⁴⁵ Idaho Code 1932, §§ 59-811, 59-812.

⁴⁶ See generally Smith-Hurd Illinois Rev. Stat. 1931, chs. 111½, 121.

⁴⁷ Smith-Hurd Illinois Rev. Stat. 1931, ch. 111½, §§ 56-59.

⁴⁸ Smith-Hurd Illinois Rev. Stat. 1931, ch. 111½, §§ 57-59, ch. 121, §§ 244-246, and S. Laws 1931, p. 781.

⁴⁹ Smith-Hurd Illinois Rev. Stat. 1931, ch. 111½, §§ 8, 9.

⁵⁰ Smith-Hurd Illinois Rev. Stat. 1931, ch. 121, §§ 203-207, and Laws 1931, p. 793.

⁵¹ Smith-Hurd Illinois Rev. Stat. 1931, ch. 121, §§ 223, 224, and Laws 1931, p. 798.

⁵² Smith-Hurd Illinois Rev. Stat. 1931, ch. 121, §§ 203, 225.

⁵³ Illinois Laws 1931, p. 789.

⁵⁴ Burns' Indiana Stat. 1926, §§ 10164-10166.

hicles must be registered. Certificate of title is prerequisite to issuance of certificate of registration.⁵⁵ There are restrictions as to dimensions, weight, load, construction,⁵⁶ and speed,⁵⁷ depending upon the location of motor vehicles. Authority of municipalities to regulate the use of vehicles by ordinance is limited.⁵⁸

The state highway commission or local authorities may issue special permits.⁵⁹ Registration fees are based upon seating capacity and tonnage.⁶⁰

§ 967. Iowa.—In Iowa the board of railroad commissioners has control over motor vehicles operated as common carriers. Its jurisdiction is between municipalities. A certificate of authorization, liability insurance, indemnity bond, and bond to insure payment of fees are all prerequisites of operation. The board may grant or repeal certificates, prescribe rules and regulations of operation, supervise accounts, fix rates and charges, require monthly reports, and prescribe safety rules.⁶¹ There are restrictions as to size and weight⁶² and speed.⁶³ Cities and towns may establish local speed limits.⁶⁴

In addition to regular registration and license fees, motor vehicles operating as common carriers are charged special mileage fees, based upon ton miles, for highway maintenance.⁶⁵

Municipalities may regulate and license jitney buses and motor vehicles operated for hire within their limits.⁶⁶

§ 968. Kansas.—In Kansas motor vehicle carriers are subject to regulation by the public service commission, and are required to obtain certificates of convenience and necessity.⁶⁷ Liability and penal bonds are required.⁶⁸ Motor vehicles are re-

⁵⁵ Burns' Indiana Stat. 1926, §§ 10085-10086, 10088-10098, 10100-10105, 10107, 10110-10124; and Burns' Indiana Stat. Supp. 1929, §§ 10087, 10099, 10104.1, 10104.2, 10106, 10108-10109.4, and Laws 1931, ch. 170.

⁵⁶ Burns' Indiana Laws 1931, ch. 83.

⁵⁷ Burns' Indiana Stat. Supp. 1929, § 10140.

⁵⁸ Burns' Indiana Stat. Supp. 1929, §§ 10146, 10154, and Laws 1931, ch. 83.

⁵⁹ Indiana Laws 1931, ch. 83, § 10.

⁶⁰ Burns' Indiana Stat. 1926, § 10091.

⁶¹ Iowa Code 1931, §§ 5105-a1—5105-a39.

⁶² Iowa Code 1931, § 5065 et seq.

⁶³ Iowa Code, 1931 §§ 5029, 5030, 5105-a34.

⁶⁴ Iowa Code 1931, § 5030.

⁶⁵ Iowa Code 1931, §§ 5105-a41—5105-a43.

⁶⁶ Iowa Code 1931, ch. 306, § 5926 et seq.

⁶⁷ Kansas Rev. Stat. Supp. 1931, §§ 66-196—66-1,118.

⁶⁸ Kansas Rev. Stat. Supp. 1931, § 66-1,102.

stricted as to size, weight, and construction,⁶⁹ and as to speed, depending upon the location,⁷⁰ and as to weight and speed.⁷¹ The state highway department may issue special permits for excessive size and weight.⁷² Local authorities may regulate the speed within city limits.⁷³ State, county, and township may erect maximum weight and speed signs at bridges.⁷⁴

Registration fee must accompany application for registration.⁷⁵ In addition to the regular license fees or taxes, a mileage tax must be paid, based upon passenger and tonnage capacity.⁷⁶ Cities may require special license fees.⁷⁷

§ 969. **Kentucky.**—In Kentucky the commissioner of motor transportation has control over the operation of motor vehicles as passenger carriers.⁷⁸ A certificate of convenience and necessity, to be renewed annually, is a prerequisite of operation. The state agency may grant, suspend, alter, or amend the certificate of convenience and necessity, regulate service and safety of operation, and make any necessary rules and regulations.⁷⁹ Indemnity bonds or insurance must be provided, or financial ability shown to satisfaction of commission.⁸⁰

Motor carrier vehicles are restricted as to width to ninety-six inches,⁸¹ as to weight, based upon tire width and kind of tire,⁸² and as to speed, based upon location, weight and kind of tires.⁸³ County judges may suspend the seasonal restriction in their jurisdiction.⁸⁴ Special registration is required on passenger motor vehicles.⁸⁵

In addition to regular registration and license fees, motor vehicles operating as common carriers of passengers are charged special fees, depending on whether the vehicle is operated be-

⁶⁹ Kansas Rev. Stat. Supp. 1931, § 68-152.

⁷⁰ Kansas Rev. Stat. Supp. 1931, § 8-122.

⁷¹ Kansas Rev. Stat. Supp. 1931, § 68-152h.

⁷² Kansas Rev. Stat. Supp. 1931, § 68-153.

⁷³ Kansas Rev. Stat. Supp. 1931, §§ 8-122, 8-125.

⁷⁴ Kansas Rev. Stat. Supp. 1931, § 68-152f.

⁷⁵ Kansas Rev. Stat. Supp. 1931, §§ 8-127—8-143.

⁷⁶ Kansas Rev. Stat. Supp. 1931, § 66-1,120.

⁷⁷ Kansas Rev. Stat. 1923, § 13-415, 13-910.

⁷⁸ Carroll's Kentucky Stat. 1930, §§ 2739j-1, 2739j-27a, and Laws 1930, chs. 75, 78.

⁷⁹ Carroll's Kentucky Stat. 1930, § 2739j-1—2739j-7.

⁸⁰ Carroll's Kentucky Stat. 1930, § 2739j-38a, and Laws 1930, ch. 78.

⁸¹ Kentucky Laws 1930, ch. 75.

⁸² Carroll's Kentucky Stat. 1930, §§ 2739g-33(b), 4345a-1—4345a-5.

⁸³ Carroll's Kentucky Stat. 1930, §§ 4344-4345a-5, and Laws 1930, ch. 79.

⁸⁴ Carroll's Kentucky Stat. 1930, § 4345a-2.

⁸⁵ Kentucky Laws 1930, ch. 81.

tween fixed or other than fixed points and the capacity of the vehicle.⁸⁶

§ 970. **Louisiana.**—In Louisiana the public service commission is given power and authority by the constitution to supervise, govern, regulate, and control public utilities.⁸⁷ By statute, motor vehicle common carriers, operating over highways between fixed termini or over a regular or irregular route for the transportation of persons or property, or both, for compensation, are declared public utilities, and made subject to the jurisdiction of the public utilities commission, and to rules and regulations of said commission with respect to rates, routes, fares, schedules, continuity of service, and the convenience and safety of passengers and freight and the public.⁸⁸ But persons or corporations or their legal representatives, in so far as they own, control, operate, or manage hotel buses, school buses, funeral cars, or taxicabs, operating under the regulation, control, and supervision of other proper legal authority, are exempt from above provisions.⁸⁹ Certificate of public convenience and necessity, and liability insurance policy or bond are prerequisites to operation.⁹⁰

Constitution reserves to municipalities the power of supervision, regulation, and control over their local public utilities, and authorizes them, by election, to surrender such powers to the public utilities commission, or, in like manner, to reinvest themselves with such powers.⁹¹ There are restrictions on motor vehicles as to speed, width with or without load, length, combination, width of load, length of load, and tire equipment.⁹² There are special requirements and regulations as to equipment, such as brakes, horn and warning devices, fire extinguishers, mirrors, lights, and headlamps, rear lamps, and clearance lamps.⁹³

Motor vehicles operating as common carriers are charged special registration and license taxes depending on the horse power, kind of tires used, and capacity of the vehicle. Operators for hire are charged a license fee.⁹⁴

§ 971. **Maine.**—The public utilities commission has control over motor vehicles operated as common carriers of passengers

⁸⁶ Carroll's Kentucky Stat. 1930, § 2739j-27, as amended by Laws 1930, ch. 75.

⁸⁷ Louisiana Const. 1921, art. 7, § 4.

⁸⁸ Dart's Stat. 1932, §§ 5310, 5311.

⁸⁹ Dart's Stat. 1932, § 5310, subsec. f, and § 5318.

⁹⁰ Dart's Stat. 1932, §§ 5312, 5315.

⁹¹ Louisiana Const. 1921, art. 6, § 7.

⁹² Dart's Stat. 1932, §§ 5205-5209, and §§ 5228-5232.

⁹³ Dart's Stat. 1932, §§ 5233-5239.

⁹⁴ Dart's Stat. 1932, §§ 5179-5181.

for hire over regular routes between points in the state of Maine. A certificate of permission is a prerequisite of operation. The state agency may make rules and regulations, fix rates, fares, regulate routes and schedules, revoke certificates of permission, and regulate all similar matters.⁹⁵ The restrictions on motor vehicles in Maine are on size, weight, and speed, size as to width and height,⁹⁶ weight depending on number of axles and size and kind of tires,⁹⁷ speed depending on the location, what carried, and the kind of tires.⁹⁸ The state highway commission, and municipal officers may make additional restrictions on roads under their jurisdiction,⁹⁹ and the highway commission and local authorities may allow restricted vehicles to operate in special cases.¹

Motor vehicles used for conveyance of passengers for hire are charged additional registration fees over the regular fee for a similar vehicle not operating for hire.²

§ 972. **Maryland.**—The public service commission has control over motor vehicles operating as common carriers both within and between cities. An annual permit is a prerequisite of operation. The state agency may grant or refuse permits, make rules and regulations governing operation, fix rates, fares, schedules, etc., and provide for the safety and convenience of the traveling and shipping public.³ There are restrictions of size, weight, speed, construction, and equipment. The restriction on weight depends on the size of tires used, with a maximum gross weight. The speed depends on the location and the kind of tire, and size, weight, construction and equipment of the motor vehicle.⁴ Counties, special taxing areas, and other municipal subdivisions of the state may prescribe and enforce reasonable traffic regulations.⁵

Motor vehicles operating as common carriers in Maryland are charged special taxes. Passenger carriers are classed according

⁹⁵ Maine Rev. Stat. 1930, ch. 66.

⁹⁶ Maine Rev. Stat. 1930, ch. 29, § 15.

⁹⁷ Maine Rev. Stat. 1930, ch. 29, § 56, as amended by Laws 1931, ch. 278.

⁹⁸ Maine Rev. Stat. 1930, ch. 29, §§ 62, 69.

⁹⁹ Maine Rev. Stat. 1930, ch. 29, §§ 53, 85.

¹ Maine Rev. Stat. 1930, ch. 29, §§ 69, 85.

² Maine Rev. Stat. 1930, ch. 29, § 54.

³ Bagby's Maryland Code 1924, ch. 56, § 251 et seq., as amended by Laws 1927, ch. 620, and § 258, as amended by Laws 1929, ch. 225; Bagby's Maryland Code 1924, ch. 23, § 347 et seq., as amended by Laws 1931, ch. 485.

⁴ Bagby's Maryland Code 1924, ch. 56, § 194, as amended by Laws 1927, ch. 520.

⁵ Maryland Laws 1929, ch. 319.

to the weight of the vehicles and the kind of tires used, and a fee of each class is determined by the seating capacity and the number of miles traveled. Property carriers are classed according to weight and fees charged, regulated according to class, ton mile and kind of tires.⁶

§ 973. *Massachusetts.*—In Massachusetts the department of public utilities is the state agency in control of motor vehicles operating as common carriers. A license from city or town authorities, a certificate of public convenience and necessity and a permit from the department of public utilities, and provision for indemnity, are prerequisites of operation.⁷ There are restrictions of size, weight, and speed placed on motor vehicles; as for size, width, length, and length of combination of vehicles are limited;⁸ weight is limited according to the size of tires with a maximum gross weight;⁹ speed is limited according to the location, weight and kind of vehicle.¹⁰

Special permits may be obtained from designated officers for operating vehicles of excessive dimensions and weights.¹¹ Motor vehicles operating as common carriers of passengers in Massachusetts are obliged to pay special local taxes.¹²

§ 974. *Michigan.*—The public utilities commission has control over motor vehicle common carriers between municipalities. A certificate of public convenience and necessity and an indemnity bond or insurance in an amount approved by the commission are prerequisites of operation. The commission may prescribe rules and regulations governing operation, grant or refuse certificates, fix routes, rates, fares and other similar matters.¹³ Motor vehicles must be registered, and certificates of title are a condition precedent to registration.¹⁴ Restrictions of size, weight, and speed are placed on motor vehicles. Size is limited

⁶ Bagby's Maryland Code 1924, ch. 56, § 251, as amended by Laws 1927, ch. 620, and § 258, as amended by Laws 1927, ch. 152.

⁷ Massachusetts Laws 1931, ch. 408.

⁸ Massachusetts Gen. Laws 1921, ch. 90, § 19, as amended by Laws 1931, ch. 138, § 2.

⁹ Massachusetts Gen. Laws 1921, ch. 85, § 30, as amended by Laws 1931, ch. 138, § 1, and § 32.

¹⁰ Massachusetts Gen. Laws 1921, ch. 85, § 31, and ch. 90, § 17, as amended by Laws 1931, ch. 201.

¹¹ Massachusetts Laws 1931, ch. 138.

¹² Massachusetts Laws 1931, ch. 408.

¹³ Michigan Laws 1931, Acts 212, 312.

¹⁴ Michigan Comp. Laws 1929, §§ 4633, 4634, 4635, as amended by Laws 1931, Act 24, and §§ 4636-4638, and Laws 1931, Act 65.

in width, height, length and length of combination of vehicles,¹⁵ weight is limited according to the number of axles and size of tires with a maximum gross weight.¹⁶ Speed is limited according to weight, length, and tire equipment.¹⁷ Motor vehicles operating as common carriers are charged a privilege fee depending on the weight of the vehicle used.¹⁸

§ 975. **Minnesota.**—In Minnesota the railroad and warehouse commission exercises control over motor vehicle carriers. Certificates of convenience and necessity are necessary. Public liability or indemnity insurance, and penal bonds are required.¹⁹ Motor vehicles must be registered. Proof of ownership is condition precedent to registration.²⁰ There are restrictions of size, weight, and speed on motor vehicles; size is limited as to width, height, length, and length of combination of vehicles;²¹ weight is limited according to the amount per axle and size of tires, with a maximum gross weight;²² speed is limited according to location.²³ Highway officials may issue permits to operate restricted vehicles over roads under their control, or restrict character and weight of traffic upon highways.²⁴

Registration tax, based upon value, seating capacity, and tonnage is in lieu of all other taxes, except wheelage taxes, that municipalities may impose.²⁵

§ 976. **Mississippi.**—In Mississippi motor vehicles, operating as common carriers of passengers or freight for hire, are under control of the railroad commission. Certificates of convenience and necessity are a prerequisite to operation. Penal bond, and public liability or indemnity insurance are required.²⁶ Operation of any truck of more than six-ton carrying capacity on any road, bridge, or highway is unlawful.²⁷ There is a restriction on the

¹⁵ Michigan Comp. Laws 1929, § 4728.

¹⁶ Michigan Comp. Laws 1929, § 4760.

¹⁷ Michigan Comp. Laws 1929, §§ 4697, 4700, as amended by Laws 1931, Act 288, § 4766.

¹⁸ Michigan Laws 1931, Act 212.

¹⁹ Mason's Minnesota Stat. 1927, § 5015-1 et seq.

²⁰ Mason's Minnesota Stat. 1927, §§ 2673-1, 2674-1—2681, 2683, 2684, 2685, 2687, 2688, 2690, 2693, 2694-2699, and Mason's Minnesota Stat. Supp. 1931, §§ 2672, 2673, 2673-2—

2674, 2682, 2684-1—2684-8, 2686—2686-3, 2689, 2691, 2692.

²¹ Mason's Minnesota Stat. Supp. 1931, § 2720-35.

²² Mason's Minnesota Stat. Supp. 1931, § 2720-37.

²³ Mason's Minnesota Stat. Supp. 1931, § 2720-4.

²⁴ Mason's Minnesota Stat. Supp. 1931, §§ 2720-37, 2720-40.

²⁵ Mason's Minnesota Stat. Supp. 1931, § 2674.

²⁶ Mississippi Code 1930, § 7115 et seq.

²⁷ Mississippi Code 1930, § 5602.

speed of motor vehicles depending on the location.²⁸ Governing authorities of municipalities may prescribe traffic rules within their corporate limits, subject to limited speeds, and subject to state regulations.²⁹

Motor vehicles, operating as common carriers, are charged special additional taxes depending, in the case of passenger carriers, on horse power, plus gross weight, plus seating capacity, and property carriers, depending on the ton capacity.³⁰ Local authorities may control vehicles for hire in their jurisdiction by ordinance.³¹

§ 977. Missouri.—In Missouri motor vehicle carriers are under the control of the public service commission. Certificates of convenience and necessity, and liability insurance policies or bonds are required.³² Motor vehicles are restricted as to size, weight,³³ and speed.³⁴ There may be local regulations,³⁵ and the state highway commission may issue special permits.³⁶

In addition to a regular license and personal property tax, an annual fee, based upon passenger seating capacity, for maintenance and repair of public highways, is required at time of issuance of certificate of convenience and necessity.³⁷

§ 978. Montana.—The railroad commission is the state agency having control over motor vehicles operated for the transportation of persons and/or property for hire. A certificate of public convenience and necessity, and an indemnity bond or insurance in such penal sums as the commission may deem necessary are prerequisites of operation. The state agency may supervise operation, prescribe equitable fare and charges, examine reports and statements, and regulate facilities, service and safety of operation.³⁸ There are restrictions on the speed at which motor vehicles may operate, depending on the location.³⁹ Cities and towns may regulate the speed within their limits by ordinance.⁴⁰

²⁸ Mississippi Code 1930, §§ 5569-5572.

²⁹ Mississippi Code 1930, §§ 5569, 5587.

³⁰ Mississippi Code 1930, § 5602.

³¹ Mississippi Code 1930, § 5596.

³² Missouri Rev. Stat. 1929, § 5264-5281.

³³ Missouri Rev. Stat. 1929,

§§ 7776, 7788, and Laws 1931, p. 265.

³⁴ Missouri Rev. Stat. 1929, §§ 5270, 7775.

³⁵ Missouri Rev. Stat. 1929, §§ 7780, 7789-7791.

³⁶ Missouri Laws 1931, p. 265.

³⁷ Missouri Rev. Stat. 1929, § 5269.

³⁸ Montana Laws 1931, ch. 184.

³⁹ Montana Rev. Code, 1921, § 1742.

⁴⁰ Montana Rev. Code 1921, §§ 1742, 5041.

In addition to all of the licenses, fees, or taxes imposed upon motor vehicles in the state, an annual fee of ten dollars per vehicle is required.⁴¹

§ 979. Nebraska.—In Nebraska the railroad commission has jurisdiction over motor vehicle common carriers between municipalities. Liability insurance, or bond, is required.⁴² There are restrictions as to size, weight, and speed⁴³ of motor vehicles. Size is limited as to width and height; weight is limited as to wheels and size of tires; and speed depends upon the location and weight.⁴⁴ Local authorities may temporarily restrict use of motor vehicles as to weight,⁴⁵ and the department of public works may issue special permits.⁴⁶ There are no special taxes on motor vehicles operating as common carriers in Nebraska.

§ 980. Nevada.—In Nevada motor vehicles engaged in transporting persons or property for hire over and along the highways of the state as common carriers, are under the supervision and regulation of the public service commission. A certificate of public convenience and necessity and an indemnity bond are prerequisites of operation. The commissioners may issue or withhold certificates, regulate fares, schedules, and classifications, examine books and records, and prescribe service.⁴⁷

There are restrictions of weight, size, and speed of motor vehicles. Weight is limited, depending on the number of wheels and axles, distance between axles and size of tires;⁴⁸ size is limited as to width, which must not exceed eight feet if speed be more than eight miles per hour, and loads may not extend beyond the edge of the running board on the left side of the vehicle;⁴⁹ speed is limited to fifty miles per hour, and must not be more than what is reasonable and proper with regard to existing conditions, and county commissioners may, by ordinance, limit speed in unincorporated towns, or cities, not to exceed twenty miles per hour.⁵⁰ Motor vehicles operating as common

⁴¹ Montana Laws 1931, ch. 184, § 16(a).

⁴² Nebraska Comp. Stat. 1929, §§ 60-101—60-105.

⁴³ Nebraska Laws 1931, ch. 107.

⁴⁴ Nebraska Laws 1931, chs. 107, 110.

⁴⁵ Nebraska Laws 1931, ch. 110.

⁴⁶ Nebraska Laws 1931, ch. 107.

⁴⁷ Nevada Comp. Laws 1929, §§ 6100 et seq.

⁴⁸ Nevada Comp. Laws 1929, § 4396, as amended by Laws 1931, ch. 81.

⁴⁹ Nevada Comp. Laws 1929, § 4366.

⁵⁰ Nevada Comp. Laws 1929, § 4350.

carriers are charged special fees computed according to weight and capacity.⁵¹

§ 981. **New Hampshire.**—In New Hampshire the public service commission has control over motor vehicle passenger carriers both within and between municipalities. A permit to operate and an indemnity bond or policy of indemnity or insurance are prerequisites to operation. The commission may grant or refuse permits and establish reasonable rules and regulations governing operation.⁵²

There are restrictions of size, weight, and speed on motor vehicles. Size is limited as to width, length, and length of combination of vehicles;⁵³ weight, depending on the number of wheels, number of axles and size and kind of tires;⁵⁴ and speed, depending on the location.⁵⁵ Local authorities may place restrictions and regulate everything but speed in their respective jurisdictions.⁵⁶

The state highway commissioner and motor vehicle commissioner are jointly vested with power to grant emergency permits to move objects having excessive weight, width, or length.⁵⁷ Local authorities may fix special license fees for motor vehicles operating as common carriers.⁵⁸ Operators for hire are charged a license fee.⁵⁹

§ 982. **New Jersey.**—In New Jersey the board of public utility commissioners has control depending on some conditions over passenger carriers both within and between municipalities.⁶⁰ An indemnity bond is required by municipalities in which lines operate.⁶¹ The state agency has general supervision over rates, fares, schedules, service, equipment, accounts, reports, notice of accidents, and increases of rates.⁶² Local authorities may regu-

⁵¹ Nebraska Laws 1931, ch. 202, § 25, as amended by Laws 1931, ch. 203.

⁵² New Hampshire Public Laws 1926, ch. 258.

⁵³ New Hampshire Public Laws 1926, ch. 103, § 26.

⁵⁴ New Hampshire Public Laws 1926, ch. 103, § 22, as amended by Laws 1929, ch. 33.

⁵⁵ New Hampshire Public Laws 1926, ch. 103, §§ 17, 18, as amended by Laws 1927, ch. 76.

⁵⁶ New Hampshire Public Laws 1926, ch. 103, §§ 19-21.

⁵⁷ New Hampshire Public Laws 1926, ch. 103, § 22, as amended by Laws 1929, ch. 33.

⁵⁸ New Hampshire Public Laws 1926, ch. 258, § 9.

⁵⁹ New Hampshire Public Laws 1926, chs. 100, 102.

⁶⁰ New Jersey Comp. Stat. Supp. 1924, p. 2880, and Supp. 1930, p. 1222.

⁶¹ New Jersey Comp. Stat. Supp. 1930, § *136-400A(2).

⁶² New Jersey Comp. Stat. Supp. 1924, p. 2880.

late motor vehicles for hire in their jurisdiction.⁶³ There are restrictions on size, weight, and speed of motor vehicles. Size is limited as to width, height, length, and length of combination of vehicles;⁶⁴ weight is limited to a gross weight, and according to the size of tires and wheels;⁶⁵ speed is restricted depending on the location, and weight, and kind of tires.⁶⁶ The commissioner of motor vehicles may issue written permits for operation of restricted vehicles.⁶⁷ Motor vehicles operating as common carriers of passengers are charged special taxes depending on the passenger capacity of the vehicle.⁶⁸

§ 983. New Mexico.—In New Mexico motor vehicle common carriers of passengers or property for hire, between fixed termini or over regular routes, and not operated exclusively within limits of a city, are supervised and regulated by the corporation commission. Certificates of public convenience and necessity, and surety bond or liability insurance, are prerequisites of operation.⁶⁹ There are restrictions as to size of vehicle and load,⁷⁰ weight of vehicle and load,⁷¹ and speed, depending upon whether the vehicle is for passengers or property and the location of operation, within certain limits not exceeding forty-five miles per hour.⁷² Proper authorities may lower or raise restrictions in their jurisdiction.⁷³

Motor vehicles operating as common carriers are charged special taxes depending upon a flat rate and the carrying capacity of the vehicle. Trailers are charged additional fees. There is an additional fee if any solid tires are used;⁷⁴ and a further fee is charged for use of highways, based upon passenger and/or tonnage capacity and mileage.⁷⁵

⁶³ New Jersey Comp. Stat. Supp. 1924, § *136-400A(9), and Laws 1931, ch. 247.

⁶⁴ New Jersey Laws 1921, ch. 208, § 21, as amended by Laws 1931, ch. 171.

⁶⁵ New Jersey Laws 1921, ch. 208, §§ 14, 21, as amended by Laws 1931, ch. 171, §§ 9, 11.

⁶⁶ New Jersey Laws 1921, ch. 208, §§ 16, 21, as amended by Laws 1931, § 11.

⁶⁷ New Jersey Laws 1931, ch. 171, § 11, subsec. 4.

⁶⁸ New Jersey Laws 1921, ch. 208, § 11(3), as amended by Laws 1931, ch. 171, § 7.

⁶⁹ New Mexico Stat. 1929, § 11-1001 et seq.

⁷⁰ New Mexico Stat. 1929, § 11-710.

⁷¹ New Mexico Stat. 1929, § 11-837, as amended by Laws 1931, ch. 33.

⁷² New Mexico Stat. 1929, §§ 11-804, 11-809.

⁷³ New Mexico Stat. 1929, §§ 11-838, 11-839.

⁷⁴ New Mexico Stat. 1929, § 11-328, as amended by Laws 1931, ch. 77, § 5.

⁷⁵ New Mexico Stat. 1929, § 11-1007.

§ 984. **New York.**—In New York the public service commission has charge of motor vehicle passenger carriers both within and between cities. In New York City the rapid transit commission has control. The state agency exercises general jurisdiction over rates, fares, schedules, service, capitalization, if a corporation, and similar matters.⁷⁶ Consent of municipalities⁷⁷ and certificates of public convenience and necessity are prerequisites of operation,⁷⁸ except that where a municipality unreasonably refuses or withholds its consent, the commission may issue the certificate without such consent.⁷⁹ Motor vehicle carriers of passengers for hire, if not subject to the provisions of the Public Service Commission Law, must make provision for indemnity.⁸⁰ There are restrictions as to dimensions and weight,⁸¹ and speed.⁸² Authority of cities to regulate the operation of motor vehicles is limited.⁸³

Motor vehicles operating as common carriers are charged special taxes, depending upon the seating capacity of passenger carrying vehicles, and the weight of the property carrying vehicles. Omnibuses operating within municipalities are exempt from this special tax, but are charged a flat rate of ten dollars in addition to municipal fees.⁸⁴ Operators for hire are charged a license fee.⁸⁵

§ 985. **North Carolina.**—In North Carolina the operation of motor vehicles used in the business of transporting persons or property for compensation between municipalities is under the supervision and regulation of the corporation commission.⁸⁶ A franchise certificate and indemnity bond or insurance are required.⁸⁷ There are restrictions as to size and gross weight of

⁷⁶ New York Consol. Laws 1930, ch. 48, § 2, as amended by Laws 1931, ch. 531, §§ 5, 5-a, 45, 60-63-h, added by Laws 1931, ch. 531.

⁷⁷ New York Consol. Laws 1930, ch. 48, §§ 63-d, 63-e, added by Laws 1931, ch. 531, and ch. 63, §§ 66-68.

⁷⁸ New York Consol. Laws 1930, ch. 48, §§ 63-d, 63-e, added by Laws 1931, ch. 531.

⁷⁹ New York Consol. Laws 1930, ch. 48, § 63-e, added by Laws 1931, ch. 531.

⁸⁰ New York Consol. Laws 1930, ch. 71, § 17.

⁸¹ New York Consol. Laws 1930,

ch. 71, § 14, as repealed, new section 14 added by Laws 1931, ch. 254.

⁸² New York Consol. Laws 1930, ch. 71, § 56, as amended by Laws 1931, ch. 518.

⁸³ New York Consol. Laws 1930, ch. 71, §§ 54, 55 as amended by Laws 1931, ch. 266, and §§ 56, 90.

⁸⁴ New York Consol. Laws 1930, ch. 71, §§ 10, 11(7), 50.

⁸⁵ New York Consol. Laws 1930, ch. 71, §§ 10, 11(6).

⁸⁶ North Carolina Code 1931, § 2613K et seq.

⁸⁷ North Carolina Code 1931, §§ 2613(1)-2613(o).

motor vehicles and the type of tires.⁸⁸ Speed restriction depends upon the location of operation.⁸⁹ The railroad commission and the state highway commission may lower the limits and issue permits for the operation of restricted vehicles.⁹⁰

Motor carriers of passengers are charged special license fees, based upon weight and carrying capacity.⁹¹ Cities and towns may charge all motor vehicles operating for hire a license fee.⁹²

§ 986. *North Dakota.*—In this state the board of railroad commissioners has control over motor vehicle common carriers between municipalities.⁹³ Certificate of public convenience and necessity, and a provision for indemnity are prerequisites of operation.⁹⁴ The state agency may grant or refuse a certificate, fix and adjust rates, fares, charges, classifications, rules and regulations, and similar matters.⁹⁵ There are restrictions as to dimensions and weight,⁹⁶ and as to speed, depending upon the location of operation.⁹⁷

Motor vehicle common carriers are charged special taxes depending in the case of carriers of passengers on the capacity of the vehicle, and in the case of carriers of property upon the ton capacity.⁹⁸

§ 987. *Ohio.*—In Ohio the public utilities commission is the agency that has control over motor vehicle common carriers within and between municipalities.⁹⁹ A certificate of public convenience and necessity and provision for indemnity are prerequisites of operation.¹ The state agency may grant certificates, fix reasonable rates, fares, charges, schedules, and require reports and a uniform accounting system.² There are restrictions on size, weight, and speed on motor vehicles. The size is limited as to width, height, length and length of combination of

⁸⁸ North Carolina Code 1931, § 2613(1).

⁸⁹ North Carolina Code 1931, § 2618.

⁹⁰ North Carolina Code 1931, § 2613(1).

⁹¹ North Carolina Laws 1931, ch. 336.

⁹² North Carolina Code 1931, § 2787.

⁹³ North Dakota Laws 1927, ch. 90, as amended by Laws 1931, ch. 188.

⁹⁴ North Dakota Laws 1931, ch. 188.

⁹⁵ North Dakota Laws 1931, ch. 188.

⁹⁶ North Dakota Laws 1931, ch. 190.

⁹⁷ North Dakota Laws 1931, ch. 158.

⁹⁸ North Dakota Laws 1931, ch. 186, § 25.

⁹⁹ Throckmorton's Ohio Gen. Code 1930, § 614-86.

¹ Throckmorton's Ohio Gen. Code 1930, §§ 614-87, 614-99 as amended by Laws 1931, p. 216.

² Throckmorton's Ohio Gen. Code 1930, § 614-86.

vehicles.³ Weight is limited as to gross weight, weight per axle, and weight depending upon kind and width of tires.⁴ Speed is limited as to location,⁵ and in the case of commercial trucks, according to the weight and kind of tires.⁶ The highway commissioner or county authorities may reduce weight or speed limits or grant permission for restricted vehicles to operate in their respective jurisdictions.⁷

Motor vehicles operating as common carriers of passengers are charged special taxes depending on the passenger capacity of the vehicle and whether it operates between fixed or other than fixed points. Motor vehicle common carriers of property are charged special taxes depending on the capacity of the vehicle and whether it operates between fixed or other than fixed points. Mixed carriers are charged on the basis which will yield the greatest revenue. Operators for hire are charged a license fee.⁸

§ 988. **Oklahoma.**—In Oklahoma the corporation commission regulates motor vehicle common carriers between municipalities. Certificate of public convenience and necessity and a provision for indemnity and bond to insure payment of fees and taxes are prerequisites of operation. The state agency has complete power over certificates and general supervision, regulation and jurisdiction in matters of rates, fares, schedules, service, and similar matters.⁹ There are restrictions of width, weight and speed placed on motor vehicles. The weight is limited to a maximum gross amount, an amount per axle and per width of tires;¹⁰ speed¹¹ is restricted to a maximum speed, and trucks are limited in speed depending on their gross weight and kind of tires. There is a separate speed limit for property common carriers.¹² Proper officials may at certain seasons of the year prohibit vehicles over a certain gross weight from operating on certain highways.¹³ Separate apartments are required for white

³ Throckmorton's Ohio Gen. Code 1930, § 7248-2 as amended by Laws 1931, p. 198.

⁴ Throckmorton's Ohio Gen. Code 1930, § 7246 et seq.

⁵ Throckmorton's Ohio Gen. Code 1930, § 12603. For local speed regulation, see Throckmorton's Ohio Gen. Code 1930, §§ 6307, 12608.

⁶ Throckmorton's Ohio Gen. Code 1930, § 7249.

⁷ Throckmorton's Ohio Gen. Code 1930, §§ 7247, 7250.

⁸ Throckmorton's Ohio Gen. Code 1930, § 614-94 et seq.

⁹ Oklahoma Stat. 1931, §§ 3692-3713.

¹⁰ Oklahoma Comp. Stat. Supp. 1926, § 10214-1.

¹¹ Oklahoma Stat. 1931, §§ 10322, 10323.

¹² Oklahoma Stat. 1931, §§ 3698, 10317.

¹³ Oklahoma Stat. 1931, § 10317.

and negro passengers.¹⁴ Local traffic regulations in cities must be observed.¹⁵

In Oklahoma motor vehicle common carriers are charged special mileage taxes for maintenance and upkeep of the public highways.¹⁶

§ 989. **Oregon.**—In Oregon the public service commission has control of motor vehicle common carriers operating between cities.¹⁷ A certificate setting forth terms under which operation is permitted,¹⁸ and security to protect public interests are prerequisites of operation.¹⁹ The state agency has supervisory and regulatory powers in all matters affecting the relationship between carriers and passengers or shippers. It also may fix reasonable rates, fares, service, facilities, etc., and may supervise and regulate accounts, require reports, and other matters relative thereto.²⁰ There are restrictions of width, weight, and speed of motor vehicles. Weight is limited to maximum gross weight, distributed according to axles and tires; speed is limited on passenger vehicles, depending on the width of tires and place of operation, and on property vehicles, depending on width and kind of tires.²¹ Proper officials may reduce the weight, speed, and size limits of vehicles on the highways under their jurisdiction,²² or they may issue permits to operate restricted vehicles.²³

In addition to all other taxes provided by law, motor carriers operating passenger or/and property carrying vehicles must pay special annual charges based upon passenger and ton miles.²⁴ Motor vehicle operators must pay registration or license fees.²⁵

§ 990. **Pennsylvania.**—In Pennsylvania the public service commission has control of motor vehicle common carriers both within and between municipalities. A certificate of public convenience and necessity is a prerequisite of operation. The state agency has general power over the certificate; it may prescribe reasonable rules and regulations concerning routes, rates, fares,

¹⁴ Oklahoma Stat. 1931, § 9332 et seq.

¹⁵ Oklahoma Stat. 1931, § 10327.

¹⁶ Oklahoma Stat. 1931, § 3696.

¹⁷ Oregon Code 1930, § 55-1304.

¹⁸ Oregon Code 1930, § 55-1305.

¹⁹ Oregon Code 1930, § 55-1317.

²⁰ Oregon Code 1930, §§ 55-1331, 55-1333.

²¹ Oregon Laws 1931, ch. 360.

²² Oregon Laws 1931, ch. 360.

²³ Oregon Laws 1931, ch. 360.

²⁴ Oregon Code 1930, §§ 15-1307, 15-1315.

²⁵ Oregon Code 1930, § 55-102, as amended by Laws 1931, ch. 75; §§ 55-103, 55-104, 55-105 as amended by Laws 1931, ch. 238, and 55-106 as amended by Laws 1931, ch. 112.

speed, service, and similar matters.²⁶ There is some city regulation on vehicles.²⁷ There are restrictions on size, weight, and speed of motor vehicles. Size is limited as to width, height, length, and length of combination of vehicles.²⁸ Weight is limited to a maximum gross weight which must be distributed as prescribed depending on the number of axles, size of tires and class of vehicle.²⁹ Speed is limited according to location, and speed of commercial vehicles is limited depending on the weight of chassis and kind of tire.³⁰ Secretary of highways and local authorities may issue special permits for operation of vehicles of excessive size or weight.³¹

Motor vehicle carriers of passengers are charged special taxes depending on the capacity of the vehicle and the kind of tires.³² Operators for hire are charged a special excise tax, based upon gross receipts.³³

§ 991. Rhode Island.—In Rhode Island the public utilities commission has control over motor vehicle common carriers of passengers, both within and between municipalities. A certificate of public convenience and necessity is a prerequisite of operation. The state agency has general power over certificates. It may make rules regarding routes, rates, fares, safety, speed, and similar matters.³⁴ Taxicabs are common carriers.³⁵ There are restrictions of size, weight, and speed of motor vehicles. Size is limited in width, height, and length of combination of vehicles; gross weight is limited as to axles, size of tires and kind of road;³⁶ speed is limited according to location, there being a special speed limit for trucks depending on weight, kind of tires, and number of trailers drawn.³⁷ Local authorities may place additional limits on local highways that are not part of the state

²⁶ Pennsylvania Stat. 1920, § 18058 et seq., and Laws 1929, Act 403, § 407.

²⁷ Pennsylvania Laws 1929, Act 403, § 901.

²⁸ Pennsylvania Laws 1929, Act 403, § 902, as amended by Laws 1931, Act 263, p. 786.

²⁹ Pennsylvania Laws 1929, Act 403, § 903, as amended by Laws 1931, Act 263, p. 787.

³⁰ Pennsylvania Laws 1929, Act 403, § 1002, as amended by Laws 1931, Act 263, p. 791.

³¹ Pennsylvania Laws 1929, Act 403, § 905, as amended by Laws 1931, Act 263, p. 790.

³² Pennsylvania Laws 1929, Act 403, § 707 as amended by Laws 1931, Act 263, p. 774, and § 708.

³³ Pennsylvania Laws 1931, Act 255, p. 694.

³⁴ Rhode Island Gen. Laws 1923, ch. 254; Laws 1928, ch. 1141, and Laws 1930, ch. 1552.

³⁵ Rhode Island Laws, 1930, ch. 1552.

³⁶ Rhode Island Rev. Pub. Laws 1923, ch. 443, as amended by Laws 1926, ch. 866, and Laws 1931, ch. 1784.

³⁷ Rhode Island Laws 1926, ch. 777, and Laws 1931, ch. 1784.

system.³⁸ Proper authorities may grant permission for restricted vehicles to operate.³⁹

Operators for hire are charged double the license fee charged private operators; and for jitneys, there is a further and additional charge of two dollars for each passenger such jitney is rated to carry.⁴⁰

§ 992. **South Carolina.**—In South Carolina motor vehicle carriers of persons or property for hire, operating out of, into, and between municipalities, are under regulation and control of the railroad commission. Certificates of convenience and necessity and provision for indemnity are prerequisites of operation.⁴¹ The city council of cities having a population of between 30,000 and 50,000 have jurisdiction of motor vehicle carriers operating exclusively within such city or near vicinity.⁴² There are restrictions of dimensions, weight, and speed of motor vehicles. Weight is limited to a maximum gross weight distributed as to axles and width of tires. Also above a certain tonnage the approval of the state highway engineer must be secured before operation.⁴³ Speed is limited depending on the kind of vehicle, location, and kind of tires.⁴⁴ Proper authorities may reduce weight limits and also permit restricted vehicles to operate in their respective jurisdictions.⁴⁵ Nonresident operators of motor vehicle common carriers are charged special fees based on the weight and/or tonnage capacity.⁴⁶

§ 993. **South Dakota.**—In South Dakota the board of railroad commissioners has control of motor vehicle carriers of persons or property for hire, not operating exclusively within the limits of a municipality. A certificate of authority and an indemnity bond or insurance are prerequisites of operation. The state agency has general power over certificates. It may supervise and regulate, operate uniform system of accounts, receive and examine quarterly reports, and all similar matters.⁴⁷ There

³⁸ Rhode Island Gen. Laws 1923, § 1449, as amended by Laws 1927, ch. 1030, as amended by Laws 1928, ch. 1196.

³⁹ Rhode Island Rev. Pub. Laws 1923, ch. 443, § 2, as amended by Laws 1926, ch. 866, and § 3.

⁴⁰ Rhode Island Laws 1931, ch. 1803.

⁴¹ South Carolina Code of Laws 1932, §§ 8507-8524.

⁴² South Carolina Code of Laws 1932, § 8530.

⁴³ South Carolina Code of Laws 1932, §§ 1617-1624.

⁴⁴ South Carolina Code of Laws 1932, § 1616.

⁴⁵ South Carolina Code of Laws 1932, § 1620.

⁴⁶ South Carolina Code of Laws 1932, § 5896.

⁴⁷ South Dakota Comp. Laws 1929, §§ 9744-A, 9744-A(h), 9744-A(i) as amended by Laws 1931, ch. 179, and §§ 9744-A(j), 9744-X.

are restrictions as to size, weight, construction, and equipment,⁴⁸ and as to speed, which is limited to whatever is careful and prudent, but not to exceed certain specified limits depending upon the place and upon the weight and tire equipment.⁴⁹ Local authorities may increase the speed limits within their jurisdiction.⁵⁰ Motor vehicle common carriers of passengers are charged special taxes depending upon seating capacity.⁵¹

§ 994. **Tennessee.**—In Tennessee motor vehicle carriers of persons and property for compensation, including those operating over or along definite, fixed, announced or advertised routes between any points in a city, town, or suburb thereof, are subject to the control, supervision and regulation by the railroad and public utilities commission, and must obtain from that commission a certificate of convenience and necessity.⁵² An indemnity bond or insurance is required.⁵³ Motor vehicles must not be driven carelessly or heedlessly or without due caution. A speed of more than twenty miles per hour renders the car subject to lien for judgment obtained for accident. Municipalities may reduce such speed limit to not less than fifteen miles per hour.⁵⁴ Weight is limited to maximum of ten tons, including load, and to six hundred fifty pounds per inch of tire contact width, and is subject to further regulation by the state highway department.⁵⁵ Motor vehicles must have special equipment.⁵⁶ Motor vehicles used for transportation of persons or property must be registered with department of finance and taxation, through the county court.⁵⁷

In addition to property, franchise, license, and other taxes, fees, and charges, an annual inspection fee must be paid, based upon passenger seating capacity and tonnage capacity.⁵⁸

§ 995. **Texas.**—In Texas motor vehicle carriers of persons or property between municipalities are under regulation and control of the railroad commission. Certificates of convenience

⁴⁸ South Dakota Comp. Laws 1929, §§ 8636-Z13, 8636-Z14, as amended by Laws 1931, ch. 264, §§ 8636-Z15—8636-Z20, 8636-Z21, as amended by Laws 1931, ch. 264, and §§ 8636-Z22—8636-Z34.

⁴⁹ South Dakota Comp. Laws 1929, § 8636-G et seq.

⁵⁰ South Dakota Comp. Laws 1929, § 8636-G.

⁵¹ South Dakota Comp. Laws 1931, ch. 183, § 6.

⁵² Tennessee Code 1932, §§ 5471-5501.

⁵³ Tennessee Code 1932, § 5483.

⁵⁴ Tennessee Code 1932, §§ 2681, 2682, and Laws 1931, ch. 82.

⁵⁵ Tennessee Code 1932, §§ 2703-2705.

⁵⁶ Tennessee Code 1932, § 2693 et seq., and Laws 1931, ch. 82.

⁵⁷ Tennessee Code 1932, §§ 1149-1166, and Laws 1931, ch. 81.

⁵⁸ Tennessee Code 1932, § 5489.

and necessity and provision for indemnity are prerequisites of operation.⁵⁹ There are restrictions as to size, weight, and speed of motor vehicles.⁶⁰ Motor vehicle common carriers of passengers are charged special taxes depending on the passenger capacity of the vehicle.⁶¹ Motor vehicle carriers of property are charged special taxes, depending on whether operation is over a regular or irregular route.⁶²

§ 996. Utah.—In Utah the public utilities commission exercises control over motor vehicle common carriers, both within and between municipalities. A certificate of public convenience and necessity is a prerequisite of operation. The state agency exercises general supervision, fixes rates, fares, tolls, charges, regulates practices, facilities and methods, and may establish uniform accounting systems, make investigations, require reports, etc.⁶³ There are restrictions as to size, weight, and construction of automobiles,⁶⁴ as to tire equipment,⁶⁵ and as to speed.⁶⁶ At certain periods of the year, highway officials may restrict the right to use highways.⁶⁷

The state road commission and local authorities in their respective jurisdictions may issue special permits to operate or move vehicles of excessive size or weight.⁶⁸ Automobile corporations operating for hire are required to pay a special tax based upon tonnage or/and passenger miles.⁶⁹

§ 997. Vermont.—In Vermont the public service commission has control over motor vehicle carriers of persons or property, operating over fixed route, or between fixed termini, both within and between municipalities. A certificate of public good and an indemnity bond are prerequisite to operation. The state agency exercises general supervision over permits and establishes reasonable rules and regulations.⁷⁰ There are restrictions of size,⁷¹

⁵⁹ As to passenger carriers, see Texas Laws 1927, ch. 27, as amended by Laws 1929 (1st called sess.), ch. 78.

As to property carriers, see Texas Laws 1929, ch. 314, as amended by Laws 1929 (2d called sess.), ch. 24, and Laws 1931, ch. 277.

⁶⁰ Texas Laws 1929 (2d called sess.), ch. 42.

⁶¹ Texas Laws 1927, ch. 270, § 15, as amended by Laws 1929 (1st called sess.), ch. 78, § 6.

⁶² Texas Laws 1931, ch. 277, §§ 7, 17.

⁶³ Utah Comp. Laws 1917, tit. 91, Laws 1925, chs. 12, 117, Laws 1927, ch. 42, Laws 1929, chs. 76, 94.

⁶⁴ Utah Laws 1931, ch. 49, §§ 77-80.

⁶⁵ Utah Laws 1931, ch. 49, § 84.

⁶⁶ Utah Laws 1931, ch. 49, §§ 20-25.

⁶⁷ Utah Laws 1931, ch. 49, § 83.

⁶⁸ Utah Laws 1931, ch. 49, § 82.

⁶⁹ Utah Laws 1925, ch. 117, and Laws 1927, ch. 42, § 6.

⁷⁰ Vermont Laws 1925, Acts 73, 74.

⁷¹ Vermont Laws 1925, Act 7, § 76.

weight and speed on motor vehicles. Size is limited as to width and height; weight is limited depending on the location and width of tires;⁷² and speed is limited as to location, and on trucks, depending on weight and kind of tires.⁷³ The highway board may impose additional restrictions at seasonal periods. Local authorities may issue permits for operation of restricted vehicles in their jurisdiction.⁷⁴ There are special taxes on motor vehicle common carriers in Vermont, based upon weight and capacity.⁷⁵

§ 998. *Virginia.*—In Virginia the state corporation commission is the state agency exercising control over motor vehicle common carriers between municipalities. A certificate of public convenience and necessity and provision for indemnity are prerequisites to operation. The commission has general power over certificates and to regulate and supervise the carriers.⁷⁶ There are restrictions of size, weight, and speed of motor vehicles. Size is limited as to width, height, length, and length of combination of vehicles; weight is limited to a maximum gross amount, and is further limited depending on the size of tires and class of road;⁷⁷ permissible speed depends upon the place of operation and existing conditions.⁷⁸ Highway authorities may issue permits for excessive size and weight, or may decrease the weight limits.⁷⁹

Motor vehicle passenger carriers are charged special taxes depending on the weight, seating capacity, and miles traveled, and property carriers depending on the gross weight times the number of miles traveled.⁸⁰

§ 999. *Washington.*—In Washington the department of public works is the state agency exercising control over motor vehicle common carriers between municipalities. A certificate of public convenience and necessity and provision for indemnity are prerequisites of operation. The state agency has general power over certificates. It may fix rates, fares, charges, and similar

⁷² Vermont Laws 1925, Act 70, §§ 76-82, as amended by Laws 1929, Act 68, and Laws 1931, Act 80.

⁷³ Vermont Laws 1925, Act 70, §§ 77, 79, 86, 112-114.

⁷⁴ Vermont Laws 1925, Act 70, § 76, as amended by Laws 1929, Act 68, and Laws 1931, Act 81.

⁷⁵ Vermont Laws 1925, Act 70, §§ 30, 33, and Laws 1931, Act 76.

⁷⁶ Virginia Code 1930, § 4097m et seq.

⁷⁷ Virginia Code 1930, § 2145(36) et seq.

⁷⁸ Virginia Code 1930, §§ 2544(4)-2545(9).

⁷⁹ Virginia Code 1930, §§ 2145(41), 2145(42).

⁸⁰ Virginia Code 1930, § 4097t.

matters, prescribe equipment and service, regulate accounts, require reports, etc.⁸¹ There are restrictions as to size, weight, and speed of motor vehicles in Washington.⁸² Size is limited in width and length. Weight is limited depending on the number of wheels and axles, the wheel base, and the width of tires.⁸³ Speed is limited depending on the location, kind of vehicle, and weight and kind of tires, if a truck.⁸⁴

Highway officials may issue permits for operation of heavier vehicles in their jurisdiction.⁸⁵ Motor vehicle common carriers are charged special taxes based upon a flat rate of three dollars and passenger or tonnage capacity,⁸⁶ and upon gross operating revenue.⁸⁷

§ 1000. West Virginia.—In West Virginia the state road commission is the state agency exercising control over motor vehicle common carriers.⁸⁸ License or certificate of registration, certificate of convenience, and bond or liability insurance are required.⁸⁹ If operation is to be wholly within a city, a permit from it is a prerequisite to a certificate of convenience.⁹⁰ The state agency may grant permits, make rules and regulations for the operation of vehicles, prescribe routes, schedules, fares, charges, and demand reports and information.⁹¹ There are restrictions of size, weight, and speed.⁹²

Special annual fees are required to be paid on motor vehicles based upon special statutory classification.⁹³

§ 1001. Wisconsin.—In Wisconsin the railroad commission exercises control over motor vehicle common carriers of passengers and/or property, both within and between municipalities. A certificate or permit from the railroad commission, the consent of the municipality, and provision for indemnity are prerequisites of operation. The state agency has general power to determine fares, routes and service.⁹⁴ There are restrictions as

⁸¹ Remington's Washington Comp. Stat. Supp. 1922, §§ 6382, 6383, 6389-6392.

⁸² Washington Laws 1929, ch. 180.

⁸³ Washington Laws 1929, ch. 180, §§ 2-7.

⁸⁴ Washington Laws 1929, ch. 180, § 2.

⁸⁵ Washington Laws 1929, ch. 180, § 5.

⁸⁶ Washington Laws 1931, ch. 140.

⁸⁷ Washington Laws 1929, ch. 108.

⁸⁸ West Virginia Code 1931, ch. 17, art. 2, § 8.

⁸⁹ West Virginia Code 1931, ch. 17, art. 6, §§ 2-9.

⁹⁰ West Virginia Code 1931, ch. 17, art. 6, § 7.

⁹¹ West Virginia Code 1931, ch. 17, art. 2, § 8.

⁹² West Virginia Laws 1931, ch. 59.

⁹³ West Virginia Code 1931, ch. 17, art. 6, §§ 9-20.

⁹⁴ Wisconsin Stat. 1931, §§ 194.01-194.16.

to size, weight and speed of motor vehicles. Size is limited as to width, length, and length of combination of vehicles;⁹⁵ weight is limited to a maximum gross amount depending on the class of highway, and also as to amount per axle and width of tires;⁹⁶ speed is limited as to location, and of trucks, depending also on the weight and kind of tires.⁹⁷ These restrictions may be lowered or raised in specific instances by proper officials.⁹⁸ Motor vehicle common carriers are charged a special tax based upon ton miles.⁹⁹

§ 1002. **Wyoming.**—In Wyoming the public service commission exercises control over motor vehicle common carriers. A certificate of convenience and necessity, if operating over regular route, or permit, if contract carrier or interstate carrier, and provision for indemnity are prerequisites of operation. The state agency has general power to regulate and supervise, act as arbitrators, examine any public utility, demand reports, make complaints, change rates, and exercise all necessary incidental powers.¹ There are restrictions as to dimensions of vehicles, including load; weight, including load; and speed, which must be reasonable and proper, and depends upon the location and conditions.² Special permit may be had for operation of vehicles of special size and weight, and at special speed.³

Motor vehicle carriers are required to pay special mileage tax, depending upon tonnage or/and passenger capacity, and kind of tires.⁴

⁹⁵ Wisconsin Stat. 1931, § 85.45.

⁹⁶ Wisconsin Stat. 1931, §§ 85.46-85.51.

⁹⁷ Wisconsin Stat. 1931, §§ 85.40, 85.41, 195.05.

⁹⁸ Wisconsin Stat. 1931, §§ 85.43, 85.53, 85.54.

⁹⁹ Wisconsin Stat. 1931, § 76.54.

¹ Wyoming Rev. Stat. 1931,

§ 72-501 et seq.

² Wyoming Rev. Stat. 1931,

§§ 72-201, 72-203.

³ Wyoming Rev. Stat. 1931,

§§ 72-201, 72-202.

⁴ Wyoming Rev. Stat. 1931,

§§ 72-519, 72-520.

APPENDIX

RADIO LAWS
OF
THE UNITED STATES

RADIO-COMMUNICATION AS AFFECTING OCEAN LINERS

§ 1. **Steamers—Radio equipment.**—From and after October first, nineteen hundred and twelve, it shall be unlawful for any steamer of the United States or of any foreign country navigating the ocean or the Great Lakes and licensed to carry, or carrying, fifty or more persons, including passengers or crew or both, to leave or attempt to leave any port of the United States unless such steamer shall be equipped with an efficient apparatus for radio communication, in good working order, capable of transmitting and receiving messages over a distance of at least one hundred miles, day or night. An auxiliary power supply, independent of the vessel's main electric power plant, must be provided which will enable the sending set for at least four hours to send messages over a distance of at least one hundred miles, day or night, and efficient communication between the operator in the radio room and the bridge shall be maintained at all times.

The radio equipment must be in charge of two or more persons skilled in the use of such apparatus, one or the other of whom shall be on duty at all times while the vessel is being navigated. Such equipment, operators, the regulation of their watches, and the transmission and receipt of messages, except as may be regulated by law or international agreement, shall be under the control of the master, in the case of a vessel of the United States; and every wilful failure on the part of the master to enforce at sea the provisions of this paragraph as to equipment, operators, and watches shall subject him to a penalty of one hundred dollars.

The provisions of this section shall not apply to steamers plying between ports, or places, less than two hundred miles apart. [Act June 24, 1910, ch. 379, § 1, 36 Stat. at L. 629; Act July 23, 1912, ch. 250, § 1, 37 Stat. at L. 199; U. S. Code, tit. 46, § 484.]

§ 2. Radio-communication — Efficiency requirements.—For the purpose of this act apparatus for radio-communication shall not be deemed to be efficient unless the company installing it shall contact in writing to exchange, and shall, in fact, exchange, as far as may be physically practicable, to be determined by the master of the vessel, messages with shore or ship stations using other systems of radio-communication. [Act June 24, 1910, ch. 379, § 2, 36 Stat. at L. 630; U. S. Code, tit. 46, § 485.]

§ 3. Master of vessel—Penalty for violating provisions of act.—The master or other person being in charge of any such vessel which leaves or attempts to leave any port of the United States in violation of any of the provisions of this act shall, upon conviction, be fined in a sum not more than five thousand dollars, and any such fine shall be a lien upon such vessel, and such vessel may be libeled therefor in any district court of the United States within the jurisdiction of which such vessel shall arrive or depart, and the leaving or attempting to leave each and every port of the United States shall constitute a separate offense. [Act June 24, 1910, ch. 379, § 3, 36 Stat. at L. 630; U. S. Code, tit. 46, § 486.]

§ 4. Regulations—Power of secretary of commerce to promulgate.—The secretary of commerce shall make such regulations as may be necessary to secure the proper execution of this act by collectors of customs and other officers of the government. [Act June 24, 1910, ch. 379, § 4, 36 Stat. at L. 630; Act Mar. 1913, ch. 141, 37 Stat. at L. 736; U. S. Code, tit. 46, § 487.]

§ 5. Effective date of act—Cargo steamers—Radio operators.—This act, so far as it relates to the Great Lakes, shall take effect on and after April first, nineteen hundred and thirteen, and so far as it relates to ocean cargo steamers shall take effect on and after July first, nineteen hundred and thirteen: provided, that on cargo steamers, in lieu of the second operator provided for in this act, there may be substituted a member of the crew or other person who shall be duly certified and entered in the ship's log as competent to receive and understand distress calls or other usual calls indicating danger, and to aid in maintaining a constant wireless watch so far as required for the

safety of life. [Act July 23, 1912, ch. 250, § 2, 37 Stat. at L. 200; U. S. Code, tit. 46, § 488.]

RADIO ACT OF 1927

The original section numbers of the 1927 Act, and which are referred to in the text, appear in the history notes at the end of each section.

§ 6. **Jurisdiction of commission.**—This act is intended to regulate all forms of interstate and foreign radio transmissions and communications within the United States, its territories and possessions; to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by individuals, firms, or corporations, for limited periods of time, under licenses granted by federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. That no person, firm, company, or corporation shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any territory or possession of the United States or in the District of Columbia to another place in the same territory, possession, or district; or (b) from any state, territory, or possession of the United States, or from the District of Columbia to any other state, territory, or possession of the United States; or (c) from any place in any state, territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any state when the effects of such use extend beyond the borders of said state, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said state to any place beyond its borders, or from any place beyond its borders to any place within said state, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said state; or (e) upon any vessel of the United States; or (f) upon any aircraft or other mobile stations within the United States, except under and in accordance with this act and with a license in that behalf granted under the provisions of this act. [Act Feb. 23, 1927, ch. 169, § 1, 44 Stat. at L. 1162; U. S. Code, tit. 47, § 81.]

§ 7. **Zones created and defined.**—For the purposes of this act, the United States is divided into five zones, as follows: The first zone shall embrace the states of Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, New York,

New Jersey, Delaware, Maryland, the District of Columbia, Porto Rico, and the Virgin Islands; the second zone shall embrace the states of Pennsylvania, Virginia, West Virginia, Ohio, Michigan, and Kentucky; the third zone shall embrace the states of North Carolina, South Carolina, Georgia, Florida, Alabama, Tennessee, Mississippi, Arkansas, Louisiana, Texas, and Oklahoma; the fourth zone shall embrace the states of Indiana, Illinois, Wisconsin, Minnesota, North Dakota, South Dakota, Iowa, Nebraska, Kansas, and Missouri; and the fifth zone shall embrace the states of Montana, Idaho, Wyoming, Colorado, New Mexico, Arizona, Utah, Nevada, Washington, Oregon, California, the Territory of Hawaii, and Alaska. [Act Feb. 23, 1927, ch. 169, § 2, 44 Stat. at L. 1162; U. S. Code, tit. 47, § 82.]

§ 8. **Organization of federal radio commission.**—A commission is hereby created and established to be known as the Federal Radio Commission, hereinafter referred to as the commission, which shall be composed of five commissioners appointed by the President, by and with the advice and consent of the senate, and one of whom the President shall designate as chairman: provided, that chairmen thereafter elected shall be chosen by the commission itself.

Each member of the commission shall be a citizen of the United States and an actual resident citizen of a state within the zone from which appointed at the time of said appointment. Not more than one commissioner shall be appointed from any zone. No member of the commission shall be financially interested in the manufacture or sale of radio apparatus or in the transmission or operation of radiotelegraphy, radiotelephony, or radio broadcasting. Not more than three commissioners shall be members of the same political party.

The term of office of each member of the commission shall expire on February 23, 1930, and thereafter commissioners shall be appointed for terms of two, three, four, five, and six years, respectively, the term of each to be designated by the President, but their successors shall be appointed for terms of six years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the commissioner whom he shall succeed.

The first meeting of the commission shall be held in the city of Washington at such time and place as the chairman of the commission may fix. The commission shall convene thereafter at such times and places as a majority of the commission may determine, or upon call of the chairman thereof.

The commission may appoint a secretary, and such clerks, special counsel, experts, examiners, and other employees as it may from time to time find necessary for the proper performance of its duties and as from time to time may be appropriated for by congress.

The commission shall have an official seal and shall annually make a full report of its operations to the congress.

The members of the commission shall receive compensation at the rate of \$10,000 per annum, until such time as is otherwise provided for by law, and also their necessary traveling expenses. [Act Feb. 23, 1927, ch. 169, § 3, 44 Stat. at L. 1162; Act Mar. 28, 1928, ch. 263, § 4, 45 Stat. at L. 373; Act Mar. 4, 1929, ch. 701, § 4, 45 Stat. at L. 1559; Act Dec. 18, 1929, ch. 7, § 2, 46 Stat. at L. 50; U. S. Code, tit. 47, § 83.]

§ 9. Duties of commission.—Except as otherwise provided in this act, the commission, from time to time, as public convenience, interest, or necessity requires, shall—

- (a) Classify radio stations;
- (b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;
- (c) Assign bands of frequencies or wave lengths to the various classes of stations, and assign frequencies or wave lengths for each individual station and determine the power which each station shall use and the time during which it may operate;
- (d) Determine the location of classes of stations or individual stations;
- (e) Regulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein;
- (f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this act: provided, however, that changes in the wave lengths, authorized power, in the character of emitted signals, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, in the judgment of the commission, such changes will promote public convenience or interest or will serve public necessity or the provisions of this act will be more fully complied with;
- (g) Have authority to establish areas or zones to be served by any station;
- (h) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

(i) Have authority to make general rules and regulations requiring stations to keep such records of programs, transmissions of energy, communications, or signals as it may deem desirable;

(j) Have authority to exclude from the requirements of any regulations in whole or in part any radio station upon railroad rolling stock, or to modify such regulations in its discretion;

(k) Have authority to hold hearings, summon witnesses, administer oaths, compel the production of books, documents, and papers and to make such investigations as may be necessary in the performance of its duties. The commission may make such expenditures (including expenditures for rent and personal services at the seat of government and elsewhere, for law books, periodicals, and books of reference, and for printing and binding) as may be necessary for the execution of the functions vested in the commission and, as from time to time may be appropriated for by congress. All expenditures of the commission shall be allowed and paid upon the presentation of itemized vouchers therefor approved by the chairman. [Act Feb. 23, 1927, ch. 169, § 4, 44 Stat. at L. 1163; U. S. Code, tit. 47, § 84.]

§ 10. Chief engineer and assistants.—The commission is authorized to appoint a chief engineer who shall receive a salary of \$10,000 per annum, and not to exceed two assistants to such chief engineer at salaries not to exceed \$7,500 each per annum. It may appoint such other technical assistants as it may from time to time find necessary for the proper performance of its duties and as from time to time may be appropriated for by congress. [Act Dec. 18, 1929, ch. 7, § 3, 46 Stat. at L. 50; U. S. Code, tit. 47, § 84b.]

§ 11. General counsel and assistants—Salaries.—The commission is authorized to appoint a general counsel and pay him a salary of \$10,000 per annum and not to exceed three assistants to such general counsel, at salaries of \$7,500 each per annum. It may appoint such other legal assistants as it may from time to time find necessary for the proper performance of its duties and as from time to time may be appropriated for by congress. [Act Mar. 4, 1929, ch. 701, § 5, 45 Stat. at L. 1559; U. S. Code, tit. 47, § 84a.]

§ 12. Duties of secretary of commerce—Appeals.—From and after one year after the first meeting of the commission created by this act, all the powers and authority vested in the commis-

sion under the terms of this act, except as to the revocation of licenses, shall be vested in and exercised by the secretary of commerce; except that thereafter the commission shall have power and jurisdiction to act upon and determine any and all matters brought before it under the terms of this section.

It shall also be the duty of the secretary of commerce—

(a) For and during a period of one year from the first meeting of the commission created by this act, to immediately refer to the commission all applications for station licenses or for the renewal or modification of existing station licenses.

(b) From and after one year from the first meeting of the commission created by this act, to refer to the commission for its action any application for a station license or for the renewal or modification of any existing station license as to the granting of which dispute, controversy, or conflict arises or against the granting of which protest is filed within ten days after the date of filing said application by any party in interest and any application as to which such reference is requested by the applicant at the time of filing said application.

(c) To prescribe the qualifications of station operators, to classify them according to the duties to be performed, to fix the forms of such licenses, and to issue them to such persons as he finds qualified.

(d) To suspend the license of any operator for a period not exceeding two years upon proof sufficient to satisfy him that the licensee (a) has violated any provision of any act or treaty binding on the United States which the secretary of commerce or the commission is authorized by this act to administer or by any regulation made by the commission or the secretary of commerce under any such act or treaty; or (b) has failed to carry out the lawful orders of the master of the vessel on which he is employed; or (c) has wilfully damaged or permitted radio apparatus to be damaged; or (d) has transmitted superfluous radio communications or signals or radio communications containing profane or obscene words or language; or (e) has wilfully or maliciously interfered with any other radio communications or signals.

(e) To inspect all transmitting apparatus to ascertain whether in construction and operation it conforms to the requirements of this act, the rules and regulations of the licensing authority, and the license under which it is constructed or operated.

(f) To report to the commission from time to time any violations of this act, the rules, regulations, or orders of the commission, or of the terms or conditions of any license.

(g) To designate call letters of all stations.

(h) To cause to be published such call letters and such other announcements and data as in his judgment may be required for the efficient operation of radio stations subject to the jurisdiction of the United States and for the proper enforcement of this act.

The secretary may refer to the commission at any time any matter the determination of which is vested in him by the terms of this act.

Any person, firm, company, or corporation, any state or political division thereof aggrieved or whose interests are adversely affected by any decision, determination, or regulation of the secretary of commerce may appeal therefrom to the commission by filing with the secretary of commerce notice of such appeal within thirty days after such decision or determination or promulgation of such regulation. All papers, documents, and other records pertaining to such application on file with the secretary shall thereupon be transferred by him to the commission. The commission shall hear such appeal *de novo* under such rules and regulations as it may determine.

Decisions by the commission as to matters so appealed and as to all other matters over which it has jurisdiction shall be final, subject to the right of appeal herein given.

No station license shall be granted by the commission or the secretary of commerce until the applicant therefor shall have signed a waiver of any claim to the use of any particular frequency or wave length or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise. [Act Feb. 23, 1927, ch. 169, § 5, 44 Stat. at L. 1164; U. S. Code, tit. 47, § 85.]

§ 13. Government stations under President.—Radio stations belonging to and operated by the United States shall not be subject to the provisions of sections 1, 4, and 5 of this act. All such government stations shall use such frequencies or wave lengths as shall be assigned to each or to each class by the President. All such stations, except stations on board naval and other government vessels while at sea or beyond the limits of the continental United States, when transmitting any radio communication or signal other than a communication or signal re-

lating to government business shall conform to such rules and regulations designed to prevent interference with other radio stations and the rights of others as the licensing authority may prescribe. Upon proclamation by the President that there exists war or a threat of war or a state of public peril or disaster or other national emergency, or in order to preserve the neutrality of the United States, the President may suspend or amend, for such time as he may see fit, the rules and regulations applicable to any or all stations within the jurisdiction of the United States as prescribed by the licensing authority, and may cause the closing of any station for radio communication and the removal therefrom of its apparatus and equipment, or he may authorize the use or control of any such station and/or its apparatus and equipment by any department of the government under such regulations as he may prescribe, upon just compensation to the owners. Radio stations on board vessels of the United States shipping board or the United States shipping board emergency fleet corporation or the Inland and Coastwise Waterways Service shall be subject to the provisions of this act. [Act Feb. 23, 1927, ch. 169, § 6, 44 Stat. at L. 1165; U. S. Code, tit. 47, § 86.]

§ 14. **Payment for use by government.**—The President shall ascertain the just compensation for such use or control and certify the amount ascertained to congress for appropriation and payment to the person entitled thereto. If the amount so certified is unsatisfactory to the person entitled thereto, such person shall be paid only seventy-five per centum of the amount and shall be entitled to sue the United States to recover such further sum as added to such payment of seventy-five per centum which will make such amount as will be just compensation for the use and control. Such suit shall be brought in the manner provided by paragraph 20 of section 24, or by section 145 of the Judicial Code, as amended. [Act Feb. 23, 1927, ch. 169, § 7, 44 Stat. at L. 1165; U. S. Code, tit. 47, § 87.]

§ 15. **Call letters for government stations.**—All stations owned and operated by the United States, except mobile stations of the army of the United States, and all other stations on land and sea, shall have special call letters designated by the secretary of commerce.

Section 1 of this act shall not apply to any person, firm, company, or corporation sending radio communications or signals on a foreign ship while the same is within the jurisdiction of the United States, but such communications or signals shall be

transmitted only in accordance with such regulations designed to prevent interference as may be promulgated under the authority of this act. [Act Feb. 23, 1927, ch. 169, § 8, 44 Stat. at L. 1166; U. S. Code, tit. 47, § 88.]

§ 16. **Station licenses.**—The licensing authority, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this act, shall grant to any applicant therefor a station license provided for by this act.

It is hereby declared that the people of all the zones established by section 2 of this act are entitled to equality of radio broadcasting service, both of transmission and of reception, and in order to provide said equality the licensing authority shall as nearly as possible make and maintain an equal allocation of broadcasting licenses, of bands of frequency or wave lengths, of periods of time for operation, and of station power, to each of said zones when and in so far as there are applications therefor; and shall make a fair and equitable allocation of licenses, wave lengths, time for operation, and station power to each of the states, the District of Columbia, the territories and possessions of the United States within each zone, according to population. The licensing authority shall carry into effect the equality of broadcasting service hereinbefore directed, whenever necessary or proper, by granting or refusing licenses or renewals of licenses, by changing periods of time for operation, and by increasing or decreasing station power, when applications are made for licenses or renewals of licenses: provided, that if and when there is a lack of applications from any zone for the proportionate share of licenses, wave lengths, time of operation, or station power to which such zone is entitled, the licensing authority may issue licenses for the balance of the proportion not applied for from any zone, to applicants from other zones for a temporary period of ninety days each, and shall specifically designate that said apportionment is only for said temporary period. Allocations shall be charged to the state, district, territory, or possession wherein the studio of the station is located and not where the transmitter is located.

No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the

case of broadcasting licenses and not to exceed five years in the case of other licenses.

No renewal of an existing station license shall be granted more than thirty days prior to the expiration of the original license. [Act Feb. 23, 1927, ch. 169, § 9, 44 Stat. at L. 1166; as amended Mar. 28, 1928, ch. 263, § 5, 45 Stat. at L. 373; U. S. Code, tit. 47, § 89.]

§ 17. **Application for licenses.**—The licensing authority may grant station licenses only upon written application therefor addressed to it. All applications shall be filed with the secretary of commerce. All such applications shall set forth such facts as the licensing authority by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies or wave lengths and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The licensing authority at any time after the filing of such original application and during the term of any such license may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee under oath or affirmation.

The licensing authority in granting any license for a station intended or used for commercial communication between the United States or any territory or possession, continental or insular, subject to the jurisdiction of the United States, and any foreign country, may impose any terms, conditions, or restrictions authorized to be imposed with respect to submarine-cable licenses by section 2 of an act entitled "An act relating to the landing and the operation of submarine cables in the United States," approved May 24, 1921. [Act Feb. 23, 1927, ch. 169, § 10, 44 Stat. at L. 1166; U. S. Code, tit. 47, § 90.]

§ 18. **Convenience, interest, and necessity—Hearings.**—If upon examination of any application for a station license or for the renewal or modification of a station license the licensing authority shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall au-

thorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the licensing authority upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

Such station licenses as the licensing authority may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject:

(a) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies or wave length designated in the license beyond the term thereof nor in any other manner than authorized therein.

(b) Neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this act.

(c) Every license issued under this act shall be subject in terms to the right of use or control conferred by section 6 hereof.

In cases of emergency arising during the period of one year from and after the first meeting of the commission created hereby, or on applications filed during said time for temporary changes in terms of licenses when the commission is not in session and prompt action is deemed necessary, the secretary of commerce shall have authority to exercise the powers and duties of the commission, except as to revocation of licenses, but all such exercise of powers shall be promptly reported to the members of the commission, and any action by the secretary authorized under this paragraph shall continue in force and have effect only until such time as the commission shall act thereon. [Act Feb. 23, 1927, ch. 169, § 11, 44 Stat. at L. 1167; U. S. Code, tit. 47, § 91.]

§ 19. Grant or transfer of station licenses—Restrictions.—The station license required hereby shall not be granted to, or after the granting thereof such license shall not be transferred in any manner, either voluntarily or involuntarily, to (a) any alien or the representative of any alien; (b) to any foreign government, or the representative thereof; (c) to any company, corporation, or association organized under the laws of any foreign government; (d) to any company, corporation, or association of which any officer or director is an alien, or of which more

than one-fifth of the capital stock may be voted by aliens or their representatives or by a foreign government or representative thereof, or by any company, corporation, or association organized under the laws of a foreign country.

The station license required hereby, the frequencies or wave length or lengths authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner, either voluntarily or involuntarily, disposed of to any person, firm, company, or corporation without the consent in writing of the licensing authority. [Act Feb. 23, 1927, ch. 169, § 12, 44 Stat. at L. 1167; U. S. Code, tit. 47, § 92.]

§ 20. **Refusal of licenses for violations.**—The licensing authority is hereby directed to refuse a station license and/or the permit hereinafter required for the construction of a station to any person, firm, company, or corporation, or any subsidiary thereof, which has been finally adjudged guilty by a federal court of unlawfully monopolizing or attempting unlawfully to monopolize, after this act takes effect, radio communication, directly or indirectly, through the control of the manufacture or sale of radio apparatus, through exclusive traffic arrangements, or by any other means or to have been using unfair methods of competition. The granting of a license shall not estop the United States or any person aggrieved from proceeding against such person, firm, company, or corporation for violating the law against unfair methods of competition or for a violation of the law against unlawful restraints and monopolies and/or combinations, contracts, or agreements in restraint of trade, or from instituting proceedings for the dissolution of such firm, company, or corporation. [Act Feb. 23, 1927, ch. 169, § 13, 44 Stat. at L. 1167; U. S. Code, tit. 47, § 93.]

§ 21. **Revocation of licenses for cause—Hearings.**—Any station license shall be revocable by the commission for false statements either in the application or in the statement of fact which may be required by section 10 hereof, or because of conditions revealed by such statements of fact as may be required from time to time which would warrant the licensing authority in refusing to grant a license on an original application, or for failure to operate substantially as set forth in the license, for violation of or failure to observe any of the restrictions and conditions of this act, or of any regulation of the licensing authority authorized by this act or by a treaty ratified by the United States, or whenever the interstate commerce commission, or any

other federal body in the exercise of authority conferred upon it by law, shall find and shall certify to the commission that any licensee bound so to do, has failed to provide reasonable facilities for the transmission of radio communications, or that any licensee has made any unjust and unreasonable charge, or has been guilty of any discrimination, either as to charge or as to service or has made or prescribed any unjust and unreasonable classification, regulation, or practice with respect to the transmission of radio communications or service: provided, that no such order of revocation shall take effect until thirty days' notice in writing thereof, stating the cause for the proposed revocation, has been given to the parties known by the commission to be interested in such license. Any person in interest aggrieved by said order may make written application to the commission at any time within said thirty days for a hearing upon such order, and upon the filing of such written application said order of revocation shall stand suspended until the conclusion of the hearing herein directed. Notice in writing of said hearing shall be given by the commission to all the parties known to it to be interested in such license twenty days prior to the time of said hearing. Said hearing shall be conducted under such rules and in such manner as the commission may prescribe. Upon the conclusion hereof the commission may affirm, modify, or revoke said orders of revocation. [Act Feb. 23, 1927, ch. 169, § 14, 44 Stat. at L. 1168; U. S. Code, tit. 47, § 94.]

§ 22. **Operation subject to all laws.**—All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are hereby declared to be applicable to the manufacture and sale of and to trade in radio apparatus and devices entering into or affecting interstate or foreign commerce and to interstate or foreign radio communications. Whenever in any suit, action, or proceeding, civil or criminal, brought under the provisions of any of said laws or in any proceedings brought to enforce or to review findings and orders of the federal trade commission or other governmental agency in respect of any matters as to which said commission or other governmental agency is by law authorized to act, any licensee shall be found guilty of the violation of the provisions of such laws or any of them, the court, in addition to the penalties imposed by said laws, may adjudge, order, and/or decree that the license of such licensee shall, as of the date the decree or judgment becomes finally effective or as of such other date as the said decree shall fix, be revoked and that

all rights under such license shall thereupon cease: provided, however, that such licensee shall have the same right of appeal or review as is provided by law in respect of other decrees and judgments of said court. [Act Feb. 23, 1927, ch. 169, § 15, 44 Stat. at L. 1168; U. S. Code, tit. 47, § 95.]

§ 23. **Right of appeal to federal courts.**—(a) An appeal may be taken, in the manner hereinafter provided, from decisions of the commission to the court of appeals of the District of Columbia in any of the following cases:

(1) By any applicant for a station license, or for renewal of an existing station license, or for modification of an existing station license, whose application is refused by the commission.

(2) By any licensee whose license is revoked, modified, or suspended by the commission.

(3) By any other person, firm, or corporation aggrieved or whose interests are adversely affected by any decision of the commission granting or refusing any such application or by any decision of the commission revoking, modifying, or suspending an existing station license.

Such appeal shall be taken by filing with said court within twenty days after the decision complained of is effective, notice in writing of said appeal and a statement of the reasons therefor, together with proof of service of a true copy of said notice and statement upon the commission. Unless a later date is specified by the commission as part of its decision, the decision complained of shall be considered to be effective as of the date on which public announcement of the decision is made at the office of the commission in the city of Washington.

(b) The commission shall thereupon immediately, and in any event not later than five days from the date of such service upon it, mail or otherwise deliver a copy of said notice of appeal to each person, firm, or corporation shown by the records of the commission to be interested in such appeal and to have a right to intervene therein under the provisions of this section, and shall at all times thereafter permit any such person, firm, or corporation to inspect and make copies of the appellant's statement of reasons for said appeal at the office of the commission in the city of Washington. Within thirty days after the filing of said appeal the commission shall file with the court the originals or certified copies of all papers and evidence presented to it upon the application involved or upon its order revoking, modifying, or suspending a license, and also a like copy of its decision there-

on, and shall within thirty days thereafter file a full statement in writing of the facts and grounds for its decision as found and given by it, and a list of all interested persons, firms, or corporations to whom it has mailed or otherwise delivered a copy of said notice of appeal.

(c) Within thirty days after the filing of said appeal any interested person, firm, or corporation may intervene and participate in the proceedings had upon said appeal by filing with the court a notice of intention to intervene and a verified statement showing the nature of the interest of such party, together with proof of service of true copies of said notice and statement, both upon appellant and upon the commission. Any person, firm, or corporation who would be aggrieved or whose interests would be adversely affected by a reversal or modification of the decision of the commission complained of shall be considered an interested party.

(d) At the earliest convenient time the court shall hear and determine the appeal upon the record before it, and shall have power, upon such record, to enter a judgment affirming or reversing the decision of the commission, and, in event the court shall render a decision and enter an order reversing the decision of the commission, it shall remand the case to the commission to carry out the judgment of the court: provided, however, that the review by the court shall be limited to questions of law and that findings of fact by the commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the commission are arbitrary or capricious. The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 347 of title 28 of the Judicial Code by appellant, by the commission, or by any interested party intervening in the appeal.

(e) The court may, in its discretion, enter judgment for costs in favor of or against an appellant, and/or other interested parties intervening in said appeal, but not against the commission, depending upon the nature of the issues involved upon said appeal and the outcome thereof: provided, however, that this section shall not relate to or affect appeals which were filed in said court of appeals prior to the enactment of this amendment. [Act Feb. 23, 1927, ch. 169, § 16, 44 Stat. at L. 1169; Act July 1, 1930, ch. 788, 46 Stat. at L. 844; U. S. Code, tit. 47, § 96.]

§ 24. Competition with wire communications.—After the passage of this act no person, firm, company, or corporation

now or hereafter directly or indirectly through any subsidiary, associated, or affiliated person, firm, company, corporation, or agent, or otherwise, in the business of transmitting and/or receiving for hire energy, communications, or signals by radio in accordance with the terms of the license issued under this act, shall by purchase, lease, construction, or otherwise, directly or indirectly, acquire, own, control, or operate any cable or wire telegraph or telephone line or system between any place in any state, territory, or possession of the United States or in the District of Columbia, and any place in any foreign country, or shall acquire, own, or control any part of the stock or other capital share of any interest in the physical property and/or other assets of any such cable, wire, telegraph, or telephone line or system, if in either case the purpose is and/or the effect thereof may be to substantially lessen competition or to restrain commerce between any place in any state, territory, or possession of the United States or in the District of Columbia and any place in any foreign country, or unlawfully to create monopoly in any line of commerce; nor shall any person, firm, company, or corporation now or hereafter engaged directly or indirectly through any subsidiary, associated, or affiliated persons, company, corporation, or agent, or otherwise, in the business of transmitting and/or receiving for hire messages by any cable, wire, telegraph, or telephone line or system (a) between any place in any state, territory, or possession of the United States or in the District of Columbia, and any place in any other state, territory, or possession of the United States; or (b) between any place in any state, territory, or possession of the United States, or the District of Columbia, and any place in any foreign country, by purchase, lease, construction, or otherwise, directly or indirectly acquire, own, control, or operate any station or the apparatus therein, or any system for transmitting and/or receiving radio communications or signals between any place in any state, territory, or possession of the United States or in the District of Columbia, and any place in any foreign country, or shall acquire, own, or control any part of the stock or other capital share or an interest in the physical property and/or other assets of any such radio station, apparatus, or system, if in either case the purpose is and/or the effect thereof may be to substantially lessen competition or to restrain commerce between any place in any state, territory, or possession of the United States or in the District of Columbia, and any place in any foreign country, or unlawfully to create monopoly in any

line of commerce. [Act Feb. 1927, ch. 169, § 17, 44 Stat. at L. 1169; U. S. Code, tit. 47, § 97.]

§ 25. **No discrimination to candidates.**—If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station, and the licensing authority shall make rules and regulations to carry this provision into effect: provided, that such licensee shall have no power of censorship over the material broadcast under the provisions of this paragraph. No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate. [Act Feb. 23, 1927, ch. 169, § 18, 44 Stat. at L. 1170; U. S. Code, tit. 47, § 98.]

§ 26. **Consideration for service announced.**—All matter broadcast by any radio station for which service, money, or any other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, firm, company, or corporation, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person, firm, company, or corporation. [Act Feb. 23, 1927, ch. 169, § 19, 44 Stat. at L. 1170; U. S. Code, tit. 47, § 99.]

§ 27. **Operator's license.**—The actual operation of all transmitting apparatus in any radio station for which a station license is required by this act shall be carried on only by a person holding an operator's license issued hereunder. No person shall operate any such apparatus in such station except under and in accordance with an operator's license issued to him by the secretary of commerce. [Act Feb. 23, 1927, ch. 169, § 20, 44 Stat. at L. 1170; U. S. Code, tit. 47, § 100.]

§ 28. **Permits of public convenience.**—No license shall be issued under the authority of this act for the operation of any station the construction of which is begun or is continued after this act takes effect, unless a permit for its construction has been granted by the licensing authority upon written application therefor. The licensing authority may grant such permit if public convenience, interest, or necessity will be served by the construction of the station. This application shall set forth such facts as the licensing authority by regulation may prescribe as to the citizenship, character, and the financial, technical, and other ability of the applicant to construct and operate the

station, the ownership and location of the proposed station and of the station or stations with which it is proposed to communicate, the frequencies and wave length or wave lengths desired to be used, the hours of the day or other periods of time during which it is proposed to operate the station, the purpose for which the station is to be used, the type of transmitting apparatus to be used, the power to be used, the date upon which the station is expected to be completed and in operation, and such other information as the licensing authority may require. Such application shall be signed by the applicant under oath or affirmation.

Such permit for construction shall show specifically the earliest and latest dates between which the actual operation of such station is expected to begin, and shall provide that said permit will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the licensing authority may allow, unless prevented by causes not under the control of the grantee. The rights under any such permit shall not be assigned or otherwise transferred to any person, firm, company, or corporation without the approval of the licensing authority. A permit for construction shall not be required for government stations, amateur stations, or stations upon mobile vessels, railroad rolling stock, or aircraft. Upon the completion of any station for the construction or continued construction for which a permit has been granted, and upon it being made to appear to the licensing authority that all the terms, conditions, and obligations set forth in the application and permit have been fully met, and that no cause or circumstance arising or first coming to the knowledge of the licensing authority since the granting of the permit would, in the judgment of the licensing authority, make the operation of such station against the public interest, the licensing authority shall issue a license to the lawful holder of said permit for the operation of said station. Said license shall conform generally to the terms of said permit. [Act Feb. 23, 1927, ch. 169, § 21, 44 Stat. at L. 1170; U. S. Code, tit. 47, § 101.]

§ 29. **Distress signals at sea.**—The licensing authority is authorized to designate from time to time radio stations the communications or signals of which, in its opinion, are liable to interfere with the transmission or reception of distress signals of ships. Such stations are required to keep a licensed radio operator listening in on the wave lengths designated for signals of distress and radio communications relating thereto dur-

ing the entire period the transmitter of such station is in operation. [Act Feb. 23, 1927, ch. 169, § 22, 44 Stat. at L. 1171; U. S. Code, tit. 47, § 102.]

§ 30. **Priority of distress signals at sea.**—Every radio station on shipboard shall be equipped to transmit radio communications or signals of distress on the frequency or wave length specified by the licensing authority, with apparatus capable of transmitting and receiving messages over a distance of at least one hundred miles by day or night. When sending radio communications or signals of distress and radio communications relating thereto the transmitting set may be adjusted in such a manner as to produce a maximum of radiation irrespective of the amount of interference which may thus be caused.

All radio stations, including government stations and stations on board foreign vessels when within the territorial waters of the United States, shall give absolute priority to radio communications or signals relating to ships in distress; shall cease all sending on frequencies or wave lengths which will interfere with hearing a radio communication or signal of distress, and, except when engaged in answering or aiding the ship in distress, shall refrain from sending any radio communications or signals until there is assurance that no interference will be caused with the radio communications or signals relating thereto, and shall assist the vessel in distress, so far as possible, by complying with its instructions. [Act Feb. 23, 1927, ch. 169, § 23, 44 Stat. at L. 1171; U. S. Code, tit. 47, § 103.]

§ 31. **Communications at sea.**—Every shore station open to general public service between the coast and vessels at sea shall be bound to exchange radio communications or signals with any ship station without distinction as to radio systems or instruments adopted by such stations, respectively, and each station on shipboard shall be bound to exchange radio communications or signals with any other station on shipboard without distinction as to radio systems or instruments adopted by each station. [Act Feb. 23, 1927, ch. 169, § 24, 44 Stat. at L. 1171; U. S. Code, tit. 47, § 104.]

§ 32. **Priority of government stations.**—At all places where government and private or commercial radio stations on land operate in such close proximity that interference with the work of government stations can not be avoided when they are operating simultaneously such private or commercial stations as do interfere with the transmission or reception of radio communi-

cations or signals by the government stations concerned shall not use their transmitters during the first fifteen minutes of each hour, local standard time.

The government stations for which the above-mentioned division of time is established shall transmit radio communications or signals only during the first fifteen minutes of each hour, local standard time, except in case of signals or radio communications relating to vessels in distress and vessel requests for information as to course, location, or compass direction. [Act Feb. 23, 1927, ch. 169, § 25, 44 Stat. at L. 1172; U. S. Code, tit. 47, § 106.]

§ 33. **Minimum power limitations.**—In all circumstances, except in case of radio communications or signals relating to vessels in distress, all radio stations, including those owned and operated by the United States, shall use the minimum amount of power necessary to carry out the communication desired. [Act Feb. 23, 1927, ch. 169, § 26, 44 Stat. at L. 1172; U. S. Code, tit. 47, § 106.]

§ 34. **Reception of messages.**—No person receiving or assisting in receiving any radio communication shall divulge or publish the contents, substance, purport, effect, or meaning thereof except through authorized channels of transmission or reception to any person other than the addressee, his agent, or attorney, or to a telephone, telegraph, cable, or radio station employed or authorized to forward such radio communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the radio communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any message and divulge or publish the contents, substance, purport, effect, or meaning of such intercepted message to any person; and no person not being entitled thereto shall receive or assist in receiving any radio communication and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted radio communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the contents, substance, purport, effect, or meaning of the same or

any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: provided, that this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcasted or transmitted by amateurs or others for the use of the general public or relating to ships in distress. [Act Feb. 23, 1927, ch. 169, § 27, 44 Stat. at L. 1172; U. S. Code, tit. 47, § 107.]

§ 35. **False or fraudulent radiograms.**—No person, firm, company, or corporation within the jurisdiction of the United States shall knowingly utter or transmit, or cause to be uttered or transmitted, any false or fraudulent signal of distress, or communication relating thereto, nor shall any broadcasting station rebroadcast the program or any part thereof of another broadcasting station without the express authority of the originating station. [Act Feb. 23, 1927, ch. 169, § 28, 44 Stat. at L. 1172; U. S. Code, tit. 47, § 108.]

§ 36. **Censorship of profanity.**—Nothing in this act shall be understood or construed to give the licensing authority the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the licensing authority which shall interfere with the right of free speech by means of radio communications. No person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communication. [Act Feb. 23, 1927, ch. 169, § 29, 44 Stat. at L. 1172; U. S. Code, tit. 47, § 109.]

§ 37. **Rates and conditions of service.**—The secretary of the navy is hereby authorized unless restrained by international agreement, under the terms and conditions and at rates prescribed by him, which rates shall be just and reasonable, and which, upon complaint, shall be subject to review and revision by the interstate commerce commission, to use all radio stations and apparatus, wherever located, owned by the United States and under the control of the navy department (a) for the reception and transmission of press messages offered by any newspaper published in the United States, its territories or possessions, or published by citizens of the United States in foreign countries, or by any press association of the United States, and (b) for the reception and transmission of private commercial messages between ships, between ship and shore, between localities in Alaska and between Alaska and the continental United

States: provided, that the rates fixed for the reception and transmission of all such messages, other than press messages between the Pacific coast of the United States, Hawaii, Alaska, the Philippine Islands, and the Orient, and between the United States and the Virgin Islands, shall not be less than the rates charged by privately owned and operated stations for like messages and service: provided further, that the right to use such stations for any of the purposes named in this section shall terminate and cease as between any countries or localities or between any locality and privately operated ships whenever privately owned and operated stations are capable of meeting the normal communication requirements between such countries or localities or between any locality and privately operated ships, and the licensing authority shall have notified the secretary of the navy thereof. [Act Feb. 23, 1927, ch. 169, § 30, 44 Stat. at L. 1173; U. S. Code, tit. 47, § 110.]

§ 38. Definitions of terms.—The expression “radio communication” or “radio communications” wherever used in this act means any intelligence, message, signal, power, pictures, or communication of any nature transferred by electrical energy from one point to another without the aid of any wire connecting the points from and at which the electrical energy is sent or received and any system by means of which such transfer of energy is effected. [Act Feb. 23, 1927, ch. 169, § 31, 44 Stat. at L. 1173; U. S. Code, tit. 47, § 111.]

§ 39. Penalties for violations of conditions.—Any person, firm, company, or corporation failing or refusing to observe or violating any rule, regulation, restriction, or condition made or imposed by the licensing authority under the authority of this act or of any international radio convention or treaty ratified or adhered to by the United States, in addition to any other penalties provided by law, upon conviction thereof by a court of competent jurisdiction, shall be punished by a fine of not more than \$500 for each and every offense. [Act Feb. 23, 1927, ch. 169, § 32, 44 Stat. at L. 1173; U. S. Code, tit. 47, § 112.]

§ 40. Penalties for violations of act.—Any person, firm, company, or corporation who shall violate any provision of this act, or shall knowingly make any false oath or affirmation in any affidavit required or authorized by this act, or shall knowingly swear falsely to a material matter in any hearing authorized by this act, upon conviction thereof in any court of competent jurisdiction shall be punished by a fine of not more than \$5,000 or by

imprisonment for a term of not more than five years or both for each and every such offense. [Act Feb. 23, 1927, ch. 169, § 33, 44 Stat. at L. 1173; U. S. Code, tit. 47, § 113.]

§ 41. **Jurisdiction of violations.**—The trial of any offense under this act shall be in the district in which it is committed; or if the offense is committed upon the high seas, or out of the jurisdiction of any particular state or district, the trial shall be in the district where the offender may be found or into which he shall be first brought. [Act Feb. 23, 1927, ch. 169, § 34, 44 Stat. at L. 1173; U. S. Code, tit. 47, § 114.]

§ 42. **Philippine Islands and Canal Zone.**—This act shall not apply to the Philippine Islands or to the Canal Zone. In international radio matters the Philippine Islands and the Canal Zone shall be represented by the secretary of state. [Act Feb. 23, 1927, ch. 169, § 35, 44 Stat. at L. 1174; U. S. Code, tit. 47, § 115.]

§ 43. **Service by government employees.**—The licensing authority is authorized to designate any officer or employee of any other department of the government on duty in any territory or possession of the United States other than the Philippine Islands and the Canal Zone, to render therein such services in connection with the administration of the radio laws of the United States as such authority may prescribe: provided, that such designation shall be approved by the head of the department in which such person is employed. [Act Feb. 23, 1927, ch. 169, § 36, 44 Stat. at L. 1174; U. S. Code, tit. 47, § 116.]

§ 44. **Appropriations.**—The unexpended balance of the moneys appropriated in the item for "wireless communication laws," under the caption "Bureau of Navigation" in Title 3 of the act entitled "An Act making appropriations for the Departments of State and Justice and for the judiciary, and for the Departments of Commerce and Labor, for the fiscal year ending June 30, 1927, and for other purposes," approved April 29, 1926, and the appropriation for the same purposes for the fiscal year ending June 30, 1928, shall be available both for expenditures incurred in the administration of this act and for expenditures for the purposes specified in such items. There is hereby authorized to be appropriated for each fiscal year such sums as may be necessary for the administration of this act and for the purposes specified in such item. [Act Feb. 23, 1927, ch. 169, § 37, 44 Stat. at L. 1174 (this section was temporary and does not appear in the Code).]

§ 45. **Validity of act.**—If any provision of this act or the application thereof to any person, firm, company, or corporation, or to any circumstances, is held invalid, the remainder of the act and the application of such provision to other persons, firms, companies, or corporations, or to other circumstances, shall not be affected thereby. [Act Feb. 23, 1927, ch. 169, § 38, 44 Stat. at L. 1174; U. S. Code, tit. 47, § 117.]

§ 46. **Repeals.**—The act entitled "An act to regulate radio communication," approved August 13, 1912, the joint resolution to authorize the operation of government-owned radio stations for the general public, and for other purposes, approved June 5, 1920, as amended, and the joint resolution entitled "Joint resolution limiting the time for which licenses for radio transmission may be granted, and for other purposes," approved December 8, 1926, are hereby repealed.

Such repeal, however, shall not affect any act done or any right accrued or any suit or proceeding had or commenced in any civil cause prior to said repeal, but all liabilities under said laws shall continue and may be enforced in the same manner as if committed; and all penalties, forfeitures, or liabilities incurred prior to taking effect hereof, under any law embraced in, changed, modified, or repealed by this act, may be prosecuted and punished in the same manner and with the same effect as if this act had not been passed.

Nothing in this section shall be construed as authorizing any person now using or operating any apparatus for the transmission of radio energy or radio communications or signals to continue such use except under and in accordance with this act and with a license granted in accordance with the authority hereinbefore conferred. [Act Feb. 23, 1927, ch. 169, § 39, 44 Stat. at L. 1174; U. S. Code, tit. 47, § 118.]

§ 47. **Effective date of act.**—This act shall take effect and be in force upon its passage and approval, except that for and during a period of sixty days after such approval no holder of a license or an extension thereof issued by the secretary of commerce under said Act of August 13, 1912, shall be subject to the penalties provided herein for operating a station without the license herein required. [Act Feb. 23, 1927, ch. 169, § 40, 44 Stat. at L. 1174 (this section does not appear in the Code).]

§ 48. **Title—Radio Act of 1927.**—This act may be referred to and cited as the Radio Act of 1927. [Act Feb. 23, 1927, ch. 169, § 41, 44 Stat. at L. 1174; U. S. Code, tit. 47, § 119.]

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